Filed 4/7/09 P. v. Olague CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. JAMES JOSEPH OLAGUE et al., Defendants and Appellants.	C053372 (Super. Ct. No. 035627)

Defendants James Joseph Olague, Ernesto Duran Arellano, and Oscar Hurtado Cervantes appeal following their conviction for first-degree murder (Pen. Code, § 187; undesignated statutory references are to the Penal Code) of Robert Stepper and Eric Folsom, and attempted murder of Vicki Folsom and Jessica Valdez on Halloween 2002. Defendants raise a variety of contentions. We shall order modification of Cervantes's sentence to reduce to a one-third subordinate term a 10-year section 186.22

enhancement on Count 3. We shall otherwise affirm the judgments.[1]

FACTUAL AND PROCEDURAL BACKGROUND

On September 21, 2003, an indictment was filed alleging that defendants and others -- Christina Marie Marten, Nathaniel Easlon, Richard Betancourt, and (later added) Gilberto Lopez[2] -- committed the following crimes:

Count 1: First-degree murder of Robert Stepper (§ 187, subd. (a)), with enhancements alleging the murder was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(4)), Cervantes used a firearm which caused death or bodily injury (§ 12022.53, subds. (a), (d)), and a principal personally discharged a firearm causing death or bodily injury (§ 12022.53, subd. (a)). Count 2: First-degree murder of Eric Folsom, with

---

[1] We deny Olague's request for judicial notice (filed July 29, 2008) of a June 2006 newspaper article indicating Jeff Reisig, who was one of the prosecutors in this trial, won election as Yolo County District Attorney. The request for judicial notice comes too late (the day Olague filed his reply brief, after the People already filed their respondents' brief), with no legitimate justification for the delay. Even if we were to grant judicial notice, it would not change our disposition of this appeal.

[2] Marten, Easlon, Betancourt, and Lopez (who was charged in an information) are not parties to this appeal. Marten was convicted in a separate trial, and the others negotiated dispositions and testified as prosecution witnesses in this trial. Marten's appeal was pending when these defendants were tried, and we affirmed her judgment in an unpublished opinion (C050078) in December 2007.

enhancements as above. Count 3: Attempted murder of Vicki Folsom (§§ 187, subd. (a); 664, subd. (a)), with enhancements as above. Count 4: Attempted murder of Jessica Valdez, with enhancements as above.

The indictment also alleged special circumstances for multiple murder and intentional killings as participants in a criminal street gang (§ 190.2, subds. (a)(3), (a)(22). The prosecutor sought the death penalty against Arellano and Cervantes only, not against Olague.

At trial, the prosecution presented evidence supporting its theory that, although the Norteño and Sureño gangs were rivals, their members cooperated in committing these crimes because Arellano (a Norteño leader or "shot caller") and nonparty Candelario Garza (a Sureño leader) cooperated in the sale of drugs in Woodland. Arellano (a Norteño) ordered the hit because victim Stepper (a Norteño) owed him money for drugs, and Arellano wanted to send a message to others who owed money and re-instill fear in the community. Christina Marten (a Norteño) brought Stepper to the place of attack. The shooter was Cervantes, who was not a gang member but who associated with Norteños, Sureños, and Crips. Stepper was the target, and the other victims were shot either because they were in the "kill zone" or because Cervantes intentionally shot them in an attempt

to eliminate witnesses. Easlon (a Crips gang member[3]) acted as lookout. Arellano's neighbor, Gilberto Lopez (a Sureño), was the getaway driver. Olague (a Sureño) was on the street at the time of the shooting to ensure that all participants did what they were supposed to do.

Evidence adduced at trial included the following:

Easlon and Betancourt (Norteño) testified about a gathering at Arellano's apartment before Halloween 2002. Arellano asked Easlon and Betancourt to "fuck up" (beat up) Robert Stepper, who owed Arellano about $500 to $800 and was not doing what he was supposed to be doing to help the drug trade. Easlon (who owed Arellano $1,600 for drugs) and Betancourt refused to do the actual deed, because Stepper was their friend. Arellano asked Cervantes, who was also there, to "handle it." Cervantes agreed and was given some drugs.[4] Easlon, to pay off his debt, agreed to Arellano's request to station himself at the end of the street on Halloween and "make sure nobody we know goes down that street . . . ." Lopez came to the door and was told by Arellano, "[i]t's going to go down," and Lopez was needed as the getaway driver. (Though Lopez had a "beef" with Cervantes, who impregnated Lopez's girlfriend, there was evidence that Lopez

---

[3] There were so few Crips in Woodland that they had "kind of a peace treaty with the Norteños."

[4] Richard Betancourt testified "handle it" in gang lingo could mean anything from a beating to a killing.

did not know Cervantes would be involved.) Arellano took a phone call, then said "Jaime" and Garza were on the way over with the gun and told Easlon and Betancourt to leave.[5] Easlon testified he knows three "Jaimes," one of which is Olague. Easlon did not stay and therefore did not know if it was Olague who showed up. However, Easlon testified it was Olague who showed up when the crime took place.

On Halloween, around 10:00 p.m., as planned, Easlon concealed himself at the end of Oak Avenue to stand watch. Marten walked Stepper down Oak Avenue and then left. Stepper began chatting with the other victims near a pickup truck in victim Valdez's driveway. Olague, whose job was to make sure others did their job, walked Cervantes partway down the street.

As related by the surviving victims, a man approached the victims, "kind of" grinned, pulled out a gun, aimed the gun at Stepper's head, and fired from a distance of two feet (killing Stepper). The shooter then pointed the gun at the others and fired multiple times (killing 17-year-old Eric Folsom and injuring 14-year-olds Vicki Folsom and Jessica Valdez). At trial, one of the survivors identified Cervantes as the shooter, though she had not identified him a photo lineup.

---

[5] Arellano says the evidence was "a gun," not "the gun," with no indication it was part of the plan. However, the testimony was "the gun."

As Lopez drove the getaway car, Cervantes hit the dashboard and said, "I got 'em, I got 'em." Lopez had not expected any shooting. He later told Garza that Veronica Lugo (girlfriend of Guillermo Ramirez, who had been with Lopez) was in an alley and heard the gunshots. Lugo testified she was summoned to an apartment the next day where several people, including Cervantes and Olague, were present. Garza, Lopez, and Ramirez led her into a bedroom and told her to keep her mouth shut or she and her children would be killed.

An expert in criminal gangs, Sergeant Steven Gill, said rival gangs do work together in drug activity and will commit a crime such as murder together to further their criminal enterprise, enhance both gangs' reputations, and further instill fear and intimidation in the community and other gang members. A non-gang member's participation would be a way to be accepted by the gangs.

All three defendants testified at trial and denied any involvement. Arellano (age 34 at trial) said he was a Norteño for 10 years but was not a shot caller. He denied any pre-Halloween meeting, denied ordering or suggesting that anyone kill Stepper, and said he did not even know Cervantes or Olague before Halloween 2002, except for an incident where he almost got into a fight with Olague (whom he pegged as a Sureño). Arellano admitted that on one occasion he told Cervantes to "handle it" but testified he was telling Cervantes to go get a

pipe to smoke drugs. Stepper was Arellano's friend, did not buy drugs from him, and did not owe him money. On Halloween, Arellano was on his way home, saw Stepper, said hello, and noticed a car full of people wearing blue (a Sureño color). Arellano said his only prior crimes were spousal abuse, selling drugs, and participating in a prison riot in which he was just following gang orders, though he was in front of his cohorts.

Cervantes (age 28 at trial) testified he has never belonged to a gang, though he knew gang members. He knew Olague before Halloween, but not Arellano. When arrested, Cervantes said he "knew this day was coming," but he thought he was being arrested for violating probation. Cervantes denied telling his cellmate, Richard Bowie, about the case and denied tampering with his handcuffs (evidence of which was adduced as an escape attempt). Cervantes had a prior felony conviction for selling drugs and a drug-related misdemeanor. Alibi witnesses testified Cervantes was with them that night.

Olague (age 29 at trial) testified he was a gang member when he lived in Los Angeles (he equivocated on whether it was Sureño) and associated with "southerners" when he moved to Woodland. He was friendly with Cervantes. Olague did not know or have any contact with Arellano, except Olague ran from a brief confrontation with Arellano as a member of a rival gang in a parking lot about a month before the crimes. Olague denied any involvement in the crimes. He came upon the crime scene

after a friend dropped him off and he was walking to a friend's house. Olague admitted two prior felony convictions, for auto theft and verbally threatening his ex-wife.

To advance the defense theory that the police pressured the accomplices to make false confessions consistent with the prosecution's theory, the defense hammered at inconsistencies in the accomplices' statements, and a defense expert testified about how police interrogations can elicit false confessions.

In May 2006, the jury returned verdicts finding all three defendants guilty on all counts and finding true all enhancement allegations.

In June 2006, the jury set the sentence for Arellano and Cervantes at life without the possibility of parole on the two counts of first degree murder.

The trial court denied defense motions for new trial.

On July 28, 2006, the trial court sentenced Arellano to prison for life without possibility of parole on Counts 1 and 2 (first degree murder). The court sentenced Arellano to nine years on Count 4 (attempted murder) and a consecutive term of two years, four months on Count 3 (attempted murder). The court imposed three 25-years-to-life terms for the section 12022.53, subdivisions (d) and (e), enhancements on Counts 1 through 3 and a 20-year term for the section 12022.53, subdivision (c), enhancement on Count 4.

Cervantes received the same sentence, plus two 10-year section 186.22 enhancements on Counts 3 and 4 plus an eight-month consecutive term on an unrelated drug offense.

Olague received the same sentence as Arellano, except Olague received the midterm sentence of seven years (rather than the upper term of nine years) for the Count 4 attempted murder.

DISCUSSION

We shall reference the contentions by the parties who present them, but we have in mind that on appeal, as in the trial court, each defendant says he joins in the others' contentions to the extent he could benefit from them.

I. Grand Jury

Cervantes contends the trial court erred in denying a motion to dismiss the indictment on the ground that the District Attorney, by making off-the-record comments to the grand jury while the court reporter was setting up the equipment, engaged in misconduct which tainted the grand jury proceedings. Assuming the matter is subject to review on appeal after our denial of a writ petition, we see no basis for reversal.

A. Background

Since this was a capital case, all proceedings were required to be transcribed under section 190.9, though defendants do not rely on any law unique to death penalty cases. In opposition to a dismissal motion (by Arellano), the prosecution submitted declarations from (former) District

Attorney David Henderson, the court reporter at the grand jury proceeding, and deputy district attorneys Jeff Reisig and Jim Walker (who presented the case to the grand jury and later became the trial prosecutors). The declarations showed that, in the minutes it took for the court reporter to set up the equipment, Henderson told the grand jurors that this was a gang case and therefore extra security was present in and around the building, and the grand jurors should be aware of their surroundings as they came and went to their cars and should report any suspicious individuals to the police officers. One of the grand jurors asked if police could escort them to their cars, and Henderson said the police would oblige if any juror requested an escort.

The trial court allowed live cross-examination of the declarants, who testified consistent with their declarations. Contrary to Cervantes's assertion that the court allowed live testimony because Henderson's comments preconditioned the grand jury and were presumed to be prejudicial, the court stated it wanted to proceed with caution in this potential death penalty case. Henderson testified he knew they were not on the record when he spoke to the grand jurors.

The trial court denied the dismissal motion, concluding (1) the proceedings had not yet reached a critical stage requiring a reporter's transcript when Henderson made his comments and (2)

nothing was said to sway or affect the impartiality of the grand jury.

We denied a defense petition for writ of prohibition (C048249), and the California Supreme Court denied review on February 2, 2005 (S129724).

B. Analysis

A grand jury proceeding (§ 939 et seq.) is not an adversary hearing adjudicating guilt or innocence but rather an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. (§ 939.8; *Guillory v. Superior Court* (2003) 31 Cal.4th 168, 174; *People v. Brown* (1999) 75 Cal.App.4th 916, 931.) A grand jury, like a magistrate in a preliminary hearing on an information, assesses whether there is adequate basis for bringing a criminal charge. (*Guillory, supra*, 31 Cal.4th at p. 174.) An indictment once found must be presented to a competent court (§ 944), which marks the point at which the government commits itself to prosecute the person with a formal charge. (*Guillory, supra*, 31 Cal.4th at p. 175; *Brown, supra*, 75 Cal.App.4th at p. 932.)

An indictment may be set aside on the ground that the proceedings have failed to comport with the demands of due process. (*Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1038.) Due process requires grand juries to be unbiased and impartial. (§ 939.5 [grand jury foreperson shall direct any

member who cannot act impartially and without prejudice to retire]; *People v. Thorbourn* (2004) 121 Cal.App.4th 1083, 1089.) Due process may be violated if grand jury proceedings are conducted in such a way as to compromise the grand jury's ability to act independently and impartially in reaching its determination to indict based on probable cause. (*People v. Superior Court (Mouchaourab*) (2000) 78 Cal.App.4th 403, 435.) A showing of actual prejudice is necessary to justify reversal when irregularities in grand jury proceedings are challenged after trial on appeal of a conviction. (*People v. Millwee* (1998) 18 Cal.4th 96, 121-122; *People v. Towler* (1982) 31 Cal.3d 105, 123.)

Cervantes argues the error is reversible per se -- or at least subject to a *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705] (*Chapman*)) -- because the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair. We disagree.

Even accepting defendants' view that the remarks were made at a critical stage of the proceedings, the prosecutor's brief remarks did not so compromise the structural protections of the grand jury as to render the proceedings fundamentally unfair, and no showing of actual prejudice justifies reversal in this case. Cervantes suggests the District Attorney's comments constituted evidence, in violation of section 939.6, which says

the grand jury shall receive no other evidence than specified evidence. Cervantes cites *People v. Backus* (1979) 23 Cal.3d 360 at page 393, for the proposition that a presentation of inadmissible or extraneous information may compromise the independence of the grand jury and contribute to the decision to indict. Cervantes argues the District Attorney tainted the grand jury at the outset by instilling fear and subliminally introducing in the grand jurors a bias against the targets of the investigation.

We do not endorse the District Attorney's conduct but do not find a due process violation. For the most part, the District Attorney told the grand jury no more than they would find out from the opening statement, and therefore his comments could not have prejudiced defendants. The District Attorney did also say that extra security was present -- information that may or may not have come out later in the proceedings. Upon inquiry, he also said grand jurors could request an escort to their car. He also said they should be aware of their surroundings and report any suspicious activity. However, any prejudice came from the elementary fact that this was a gang case -- a fact which the grand jury would learn as soon as the opening statement began.

Cervantes compares this case to *Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311, which dismissed a case because the prosecutor had ordered the court reporter to leave the room and

not to transcribe his opening statement and closing argument to the grand jury in a capital case. However, there is no comparison. The *Dustin* court considered it "inescapable" that the prosecutor excluded the court reporter for the express purpose of precluding discovery of his comments. (*Id.* at p. 1323.) Here, the District Attorney merely made a few introductory remarks in the presence of the court reporter, and the record is settled as to what he said.

Cervantes complains we cannot know exactly what the District Attorney said. However, he elsewhere acknowledges in a footnote that "the record has effectively been settled as to what actually may have been said . . . ."

We conclude the District Attorney's unreported comments to the grand jury do not warrant reversal.

II. Venue

Cervantes contends the trial court erred in denying his motion to change venue (§ 1033;[6] Cal. Rules of Court, rule 4.151[7]) due to publicity about the case, and the error violated

---

[6] Section 1033 states, "In a criminal action pending in the superior court, the court shall order a change of venue: [¶] (a) On motion of the defendant to another county when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county."

[7] Undesignated rule references are to the California Rules of Court.

his constitutional rights to a fair and impartial jury, a fair trial, and due process.

Cervantes does not claim he exhausted his peremptory challenges. Indeed, his attorney expressed satisfaction with the jury. Cervantes acknowledges that the failure to exhaust such challenges is an indication that a defendant concluded the jurors were fair. (*People v. Panah* (2005) 35 Cal.4th 395, 448.) However, he notes Olague did exhaust his challenges, including an additional peremptory challenge given by the court (which was requested on the ground that one defense attorney had alienated prospective jurors before his client pled out). Olague joins in Cervantes's contentions to the extent they may benefit Olague.

We see no basis for reversal.

A. Background

The crimes occurred in October 2002. Defendants were arraigned in October 2003. After extensive in limine proceedings, voir dire started on August 9, 2005. Prospective jurors were told not to expose themselves to publicity about the case, and the jury questionnaires asked about their prior exposure to publicity about the case.

In October 2005, the jury was selected but was not sworn in (because the court gave a continuance for defendants to adjust to codefendants' conversion to prosecution witnesses). The court repeated to the jurors the admonition "not to read anything in the newspaper, about this case, don't watch any TV

shows like CSI, those kinds of things. . . . [¶] . . . [¶] You can read the newspaper, you can watch TV, we ask you not to read any newspaper articles about this case or any newspaper articles about other murder trials that may be going on here or somewhere else, and TV shows of the like."

On October 20, 2005, after jury selection but before the jurors were sworn in, Cervantes moved for a change of venue on the grounds of publicity in local newspapers and the jurors' having seen some codefendants dismissed with plea bargains. The newspaper articles covered not only the crime, but also reports of witnesses being threatened, the District Attorney's probe of defense counsel for alleged disclosure of witness information to defendants, the conviction of Christina Marten, Betancourt's guilty plea, in limine rulings, and jury selection. Cervantes requested funds to poll the community.

The trial court denied the motion, noting the 12 jurors and six alternates had not read about the case and had been admonished not to do so.

B. Analysis

"A trial court should grant a change of venue when the defendant demonstrates a reasonable likelihood that in the absence of such relief, he cannot obtain a fair trial. [Citations.] On appeal, 'we [as the reviewing court] make an independent determination of whether a fair trial was obtainable.' [Citations.] To make that decision, we examine

five factors: the nature and gravity of the offense, the nature and extent of the news coverage, the size of the community, the status of the defendant in the community, and the popularity and prominence of the victim. [Citation.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 905.) Where the motion is made after jury selection, the court should also take into account the prospective jurors' answers on voir dire, to determine whether pretrial publicity has, in fact, affected the defendant's ability to obtain an impartial jury. (*People v. Staten* (2000) 24 Cal.4th 434, 449.)

1. Nature and Gravity of Offense

Because this was a capital case with double murder, the nature and gravity of the offense tilts strongly in favor of granting a change in venue, although this factor is not dispositive. (*Weaver, supra*, 26 Cal.4th at p. 905.)

2. Nature and Extent of News Coverage

The motion to change venue (filed mid-October 2005) attached 14 newspaper articles (plus a few duplicates) from Yolo County's two daily newspapers -- the Woodland Daily Democrat and the Davis Enterprise -- published during a 20-month period between February 2004 and October 2005. They reported the prosecution was seeking the death penalty, a potential witness had been beaten, the defense attorneys were being investigated for wrongdoing, Betancourt and Easlon entered plea bargains, the

progress of in limine motions, when jury selection began and ended, and the outcome of Marten's trial.

However, besides failing to show the circulation of the newspapers, most of the articles were published after voir dire started on August 9, 2005, and the trial court admonished each group called for voir dire not to read any newspaper articles or watch television shows about murder cases. The court also re-admonished the jurors when they were sworn in. We have reviewed the newspaper reports in the record and agree with the People that, for the most part, they reported facts and events that later would be adduced at trial. Moreover, some of the articles were published long before voir dire began. There were only three articles in 2005 before voir dire began. As we discuss *post*, voir dire revealed no prejudice from the publicity.

Cervantes says the court apologized to the jury for a "tactless" newspaper article on March 30, 2006. Cervantes does not describe the contents of the article. From our own review of the record, we surmise it may have referred to a personal medical issue of one juror who had to withdraw and be replaced by an alternate.

Regarding television coverage, Cervantes does not complain about any pretrial television news reports about the case. Rather, he says the trial court permitted Univision Television (Channel 19) to film some trial proceedings (video only, no sound) on the condition the jurors not be shown. Cervantes also

cites various instances of media *requests* to film other parts of the trial, to show continuing public interest in the case. However, the media's interest during trial does not demonstrate reversible error in the trial court's denial of the motion to change venue.

3. Size of the Community

Cervantes says Yolo County's population at the time of trial, extrapolated from census data, was 184,364, most of whom lived in Woodland, West Sacramento, and Davis. Cervantes does not specify how many lived in Woodland. Cervantes also says Yolo County ranked 28 of the 58 California counties in terms of population. In our view, size is a neutral factor in this case, but even if it were a factor in defendant's favor, reversal would not be required.

Cervantes cites *People v. Rodriguez* (1986) 42 Cal.3d 730 at page 742, as precedent for changing venue from Yolo County, but venue was not at issue in that appeal. The introductory paragraph of the opinion merely observed that, though the crimes were committed in Yolo County, venue was changed to San Mateo County. (*Id.* at p. 742.) Cases are not authority for propositions not at issue in the appellate opinion. (*People v. Scheid* (1997) 16 Cal.4th 1, 17.)

Cervantes notes *Steffen v. Municipal Court* (1978) 80 Cal.App.3d 623 changed venue from San Mateo County which, with close to 575,000 residents (*id.* at p. 626), was much bigger than

Yolo County. However, in that case size was mentioned only with regard to the People's argument that newspaper publicity could not be regarded as pervasive, since newspaper circulation was only 65,000. The appellate court agreed with the defendants' point that the figures were misleading unless consideration were given to factors such as family size. (*Ibid.*)

The key consideration is whether it can be shown that the population is of such a size that it neutralizes or dilutes the impact of adverse publicity. (*Weaver, supra*, 26 Cal.4th at p. 905 [since adverse publicity was neither relentless nor virulent, the moderate size of Kern County, population 450,000, did not undermine the trial court's decision to deny a change of venue].)

Similarly here the moderate size of the community did not undermine the denial of a venue change.

4. Status of Defendant in the Community

Cervantes says he could not get a fair trial in Yolo County because he is an "outsider," in that he is not a native of Yolo County and has no real, sustained ties to it. He was born in Mexico (in 1974), moved to Woodland with his family when he was 12, moved to Idaho with his family when he was a high school senior, and eventually moved back to Woodland to work for his uncle in the construction field. He spent some time incarcerated for various drug offenses between 1994 and 1999. In 2000, he moved to Phoenix briefly but came back to Woodland

the same year. In November 2001, he was arrested for another drug offense. Upon his release, he moved to Oceanside. He moved back to Woodland two weeks before the murders, staying with relatives or his girlfriend.

Cervantes has ties to Woodland; he is not an outsider.

5. Status of the Victims

Cervantes acknowledges the victims were not well known before the shootings, but he quotes from *Odle v. Superior Court* (1982) 32 Cal.3d 932 at page 940, that the murder victim "by virtue of the events and media coverage after the crimes, became a posthumous celebrity . . . ." However, in *Odle* the victim was a police officer who had earned numerous commendations and left behind a pregnant wife. (*Id.* at pp. 940-941.) His funeral was attended by a thousand police officers. Schools were closed. Flags were flown at half-mast. The Chamber of Commerce named the officer "citizen of the year." A fund for the family raised over $50,000 from contributors all over the state and county. (*Ibid.*) Unlike *Odle*, Cervantes points to no similar type of evidence in this case, making the victims posthumous celebrities.

Cervantes says a local citizen can be a "prominent" victim. But he points to no evidence that these victims were "prominent."

Having considered the foregoing five factors, we see no impropriety in the trial court's denial of a venue change.

6. Claim of "Venire Pool Saturation"

Cervantes argues the transcript of voir dire shows venue should have been changed.

Prospective jurors not excused for hardship filled out a "big questionnaire" which included questions about exposure to pretrial publicity. Some prospective jurors were excused based on their written answers to the questionnaire, without verbal questioning.

According to the People, the fact that no seated juror or alternate was aware of the publicity or affected by it was the best evidence for denying a change of venue. However, "[r]esolution of the venue question requires consideration of the responses of jurors who do not ultimately become members of the trial panel as well as those who do. [Citations.]" (*Odle, supra*, 32 Cal.3d at p. 944.)

Cervantes makes various points regarding specific venirepersons (whom we consider it unnecessary to identify) who were not chosen for the jury.

He separately describes 20 persons who read newspaper articles about the case. They recalled young people were killed on Halloween; some recalled gang involvement. One person, who works with Olague's cousin, said, "Woodland not being a very big town . . . you kind of talk about the news and what's going on about the Halloween murder, there was a gal, girl, who set up these guys over a drug debt that she owed but she tried to pass

it on to these guys, they ended up getting shot, two guys and two girls in the . . . back of a truck . . . . Two guys got killed." Another person, who happened to be the cousin of a court staffer, is a teacher who taught the sister of one of the victims. The teacher read about the case in the newspaper and was privy to discussions about it in the teachers' lounge. In response to a question whether she could be fair and impartial, she wrote, "I'm not sure." Another person lives near and visited the crime scene. Another person admitted to anti-gang feelings that might limit the ability to focus on the evidence.

Cervantes notes some of these people, as well as four other prospective jurors, knew friends, relatives, or acquaintances of the victims, witnesses, or defendants. One person was privy to a gang-related incident that may or may not have been connected to this case.

Cervantes says some prospective jurors knew each other. He cites voir dire of one person who said he or she recognized several people on the panel. This person (who was the one who said Woodland was not a big town) was excused by the court after expressing too much familiarity with gangs. He said he knew a lot of gang members. He did not know these defendants but assumed they were gang members, based on what he had read in the papers over the years and heard from other people. He said, "I guess the shooter already got sent up, that is what I understand, and supposedly these are the shot callers . . . ."

Although most of the people who heard about the case said they could be impartial, Cervantes cites authority that adverse publicity can create such a presumption of prejudice that jurors' disclaimers should be disbelieved. (*Rideau v. Louisiana* (1963) 373 U.S. 723, 724-727 [10 L.Ed.2d 663]; *Irvin v. Dowd* (1961) 366 U.S. 717, 722-723 [6 L.Ed.2d 751], superseded by statute on other grounds, as stated in *Moffat v. Gilmore* (7th Cir. 1997) 113 F.3d 698.) However, the publicity in *Rideau* was a televised broadcast of the defendant confessing his guilt to police in a videotaped interrogation. In *Irvin*, the publicity included newspaper reports of the defendant's criminal record (including his juvenile record), his police line-up identification, his confession to police, the fact that on one day of voir dire 27 of 35 prospective jurors had been excused for bias, and a roving reporter's solicitation of "curbstone opinions" from the public. (*Irvin, supra,* 366 U.S. 717, 719, 725-727.) Here, defendants fail to show that the publicity in this case was such that prejudice should be presumed.

Cervantes argues the fact that he needed to use up all his peremptory challenges before the last alternate was picked shows a "concern that the defense was forced to endure a compromise of the least-objectionable jurors." He fails to show this "concern" warrants reversal of the judgment.

7. Shrinking Defense Table

Cervantes argues this case involves a unique consideration, in that the case began with seven defendants but shrank to three defendants by the time voir dire was completed. On appeal, Cervantes revisits the point raised in the trial court, that venue should have been changed because the "shrinking of the defense table" allowed the community to form a biased impression about the remaining defendants. However, the fact that others were charged and pled out would become known to any jury when those persons testified, no matter where the case was tried.

We conclude the trial court's denial of a venue change is not grounds for reversal.

III. Search of Jail Cell

Olague contends the warrantless search of his jail cell by Woodland police and seizure of documents invaded the defense camp, interfered with his attorney-client relationship, and was outrageous governmental conduct necessitating dismissal. We disagree.

A. Background

On January 23, 2004, police searched defendants' jail cells following the beating of Keen Thurman in another facility after Thurman testified before the grand jury in this case. (At trial, Thurman testified the beating was unrelated to this case.) The police believed Arellano ordered the assault. The police seized (and sealed) copies of grand jury transcripts with

Olague's handwritten notes, police reports, letters and photographs relating to this case.

On August 5, 2004, Olague moved to recuse the district attorney's office or to dismiss the action for governmental misconduct. He claimed the government attempted to intimidate defense counsel by the warrantless search and by bringing criminal charges against defense counsel for failing to redact witness names and addresses (§ 1054.2) from the documents they turned over to their clients. On September 17, 2004, Olague filed a supplemental motion claiming the prosecution and its agents had prevented him from preparing a meaningful defense and deprived him of effective assistance of counsel.

At the hearing, the prosecution adduced evidence that envelopes from Arellano had been found in the jail cell of one of Thurman's assailants, Arthur Bonton, though the letters did not refer to the Halloween murders. In searching defendants' cells, the police were looking for evidence of a relationship between defendants and Thurman's assailants or evidence of gang involvement. The police did not inform jail staff of the reason for the search. The jail staff collected items from defendants' cells and brought them to the police, who scanned documents, including documents in an envelope labeled "attorney-client," and seized copies of police reports because they contained unredacted witness information. Because of the concern about unredacted witness information which might be creating other

victims like Thurman, a second search was conducted, during which an unredacted grand jury transcript was seized and partially copied. The officers who viewed the documents testified they scanned them for failure to redact; they did not recall seeing or reading any handwritten notations.

Olague's attorney stated his motion did not challenge whether the items were properly seized, but whether the prosecution viewed attorney-client communications. The trial court indicated it understood the motion to be a motion for dismissal because the prosecution looked at something it should not have seen.

The trial court denied recusal or dismissal, stating there was no outrageous conduct and no evidence that any attorney in the district attorney's office read the documents. It was appropriate to investigate the apparent transgression of counsel in failing to redact the documents.

B. Analysis

On appeal, Olague contends the search of his cell by Woodland police violated the Fourth Amendment; the search and seizure invaded the defense camp; and dismissal is the proper remedy. We disagree. We reject, *post*, the contention that the trial court erred in denying the recusal motion.

Assuming for the sake of argument that the first point is preserved for appeal, there was no Fourth Amendment violation, because there is no expectation of privacy in a jail cell.

(*Hudson v. Palmer* (1984) 468 U.S. 517, 526 [82 L.Ed.2d 393]; *People v. Davis* (2005) 36 Cal.4th 510, 523-528 [pretrial detainee had no expectation of privacy and therefore police did not violate Fourth Amendment by tape-recording his conversations with others in holding cells].) Olague's reply brief says he raises the issue to preserve it for federal review.

Olague also says this case is different because it infringed on privileged communications between attorney and client. He notes section 2600 says a prison inmate is deprived of only such rights as is reasonably related to legitimate penological interests. He notes a regulation (Cal. Code Regs., tit. 15, § 1063) requires jail administrators to permit inmates to correspond confidentially with counsel, and the administrators may open and inspect such mail only to search for contraband and in the inmate's presence.

Olague says that, even though the District Attorney did not read the documents, the police as part of the prosecution team read the documents and discussed their contents with the District Attorney. Olague cites *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, which dismissed a case after the prosecutor sent an investigator to listen to a defendant's conversation with his attorney, even though they learned no strategic information.

However, Olague does not show that the contents of any privileged communications or defense strategy were read by the

police or conveyed to the prosecutor. All that was conveyed was that the papers contained contraband, i.e., unredacted witness information. That an envelope in a jail cell is labeled, "attorney-client" does not immunize it from a jail search. The papers from which the witness information should have been redacted were not, in and of themselves, privileged communications. They were police reports and court transcripts. The failure to redact would be obvious from scanning the face of the documents, since redaction typically leaves chunks blacked out or whited out.

This case is not like *Morrow, supra*, 30 Cal.App.4th 1252, where the prosecutor "orchestrated" an eavesdropping upon a privileged attorney-client conversation. (*Id.* at p. 1261.) Here, the initial police discovery of defense counsel's breach of his duty to redact witness personal information was happenstance. There is no evidence the prosecutor was apprised of the contents of any handwritten notes on the grand jury transcript. Although Olague says the trial court found the prosecutor's agent read the documents, what the court said was that the agent had an opportunity to review the materials. There is no evidence the agent read any handwritten notes on the materials.

Olague argues that to meet his burden he would have had to show the handwritten notes to the government witnesses -- thereby waiving attorney-client privilege -- in order to

question them on the witness stand as to whether they had read them. Not true.

Olague argues the burden should have been on the prosecution to show absence of prejudice, because when the government affirmatively takes steps to interfere with the attorney-client relationship, it would be difficult for the defendant to show prejudice. However, the government did not affirmatively take steps to interfere with any attorney-client relationship. We see no parallel between this case and Olague's cited cases where undercover agents posing as codefendants of the accused attended strategy sessions between the accused and his attorney.

There are no grounds for reversal regarding the jailhouse search and seizure.

IV. Courtroom Restraints

Cervantes contends the trial court improperly ordered him to be restrained during trial without a showing of manifest need, and any consent by defense counsel to the restraints was "extorted" by the "threat" of a more severe restraint -- a "REACT" (stun) belt. We see no basis for reversal.

A. Background

In limine, the trial court indicated defendants would be restrained in some way pursuant to county policy and "[g]iven recent events." The court later clarified it was "talking about Chicago and Atlanta and given this many defendants, that's all."

The court also acknowledged, however, that restraints had to be decided on a case-by-case basis with an opportunity for the parties to object. The trial court (which had presided over Christina Marten's trial), said she was not restrained, but she was about four feet 10 inches tall, whereas this case involved at the time five large men in a confined area. The prosecutor agreed with defense counsel that the California Supreme Court required the trial court to make an individualized determination as to the necessity of restraint for each defendant. The trial court said, "We'll let the Supreme Court come and sit next to five people charged with capital murder. It is easy for them to say all this." When reminded that the prosecutor agreed there should be a hearing, the court said, "Fine, we'll have a hearing."

Sergeant Carter Vaughn of the Sheriff's Department, who was in charge of courthouse security, testified as follows:

Arellano had been arrested several times for domestic violence, was found in possession of a weapon in his cell (a piece of hard plastic with hooks that normally come from the bottom of plastic chairs), joined in when other inmates made a scene (though he was well-behaved if alone), and had a gang tattoo on his neck (the number 14). Gangs present security problems because "if one moves they all move. They tend to cover each others back [*sic*]. If one decides to make a decision to fight in the courtroom then they're all going to fight in the

courtroom. Even the audience changes, the dynamics of the audience and the people that come to court are different than they are say for a burglary case with no gang affiliation." Given the nature of the charges, these defendants did not have a lot to lose by creating a disturbance in the courtroom. They sometimes refused to obey the deputies' orders, and if one defendant acted out, the others usually joined in. They routinely disobeyed the directive not to communicate in court with anyone other than the judge or their attorneys. They were not "written up" for noncompliance because it would be pointless, since they were already in administrative segregation.

Cervantes was normally the first of the defendants to disobey the deputies' orders. He had a prior arrest for possession of a concealed firearm. (He was in a car which had a gun under the seat of another passenger; he pled no contest to drug possession and was sent to drug diversion for six months; the other charges were dropped.) An incident report revealed he was found with contraband in his cell while awaiting this trial, but the report did not specify the nature of the contraband. Family members attempted several times to communicate with Cervantes as he went back and forth to court.

Olague had prior arrests for crimes of violence, i.e., challenging people to fight, dissuading a witness, stalking, threatening people, and brandishing weapons. A razor blade was

found in his cell while awaiting this trial. He was belligerent to correctional staff, argumentative and refused to obey orders, even simple orders such as refusing to lock down.

The Sergeant described the physical aspects of the courtroom that raised security concerns. Two tables for defendants and their attorneys sat less than two feet from the prosecution table, about five feet from the jury box, 15 to 20 feet from the judge and court reporter, and 10 feet from the first row of the audience. All tables had a "vanity skirt" which prevented a view of defendants' feet from the jury's position. The security concerns about the audience were that an audience member might try to assault or pass something to a defendant.

There were three options for restraints: (1) a REACT stun belt, (2) ankle shackles and belly chains, and (3) handcuffs. The REACT belt, which could be secured under a pant leg, would be the least visible to jurors. Defendants would have to keep their hands on the table at all times. If not, a deputy would issue a warning (a beep). If the defendant did not respond, the belt would be activated, sending 50,000 volts, which could leave electrical burns on the skin. On a scale of one to 10, the REACT belt could be rated seven in terms of pain. This would be the first time the REACT belt was used in a Yolo County courtroom. This belt is a different model from another belt which had accidental activations.

The county buys about 200 sets of handcuffs a year and has to replace about 40 sets a year due to tampering.

The court found a manifest need for some form of restraint because of the nature of the charges, the number of defendants, the physical proximity of defendants to everyone (jurors, prosecutors, witnesses and audience), defendants' conduct, and the fact that 12 jurors already found Christina Marten guilty in her severed trial.

The court opted for belly chains with the lock in the back, leaving one hand free. These restraints were not visible when defendants were sitting in court.[8] (Although Cervantes complains both hands were restrained when the court was "short on security," that was outside the jury's presence.)

On September 21, 2005, the Sergeant told the court that when he removed Cervantes's handcuffs the preceding day, one of the handcuffs had come off and the other was bent, suggesting

---

[8] During voir dire some prospective jurors may have seen defendants being transported between the court and jail chained together. The trial court therefore included in the jury instructions an instruction that "[t]he fact that physical restraints may have been placed on any defendant may not be considered by you for any purpose. They are not evidence of guilt and must not be considered by you as any evidence that he is more likely to be guilty than not guilty. You must not speculate as to why restraints may have been used. [¶] In determining the issues in this case, disregard this matter entirely." Cervantes acknowledges on appeal that the constitutional protections he invokes on this issue do not extend to those times when a defendant is being transported to or from court.

tampering. Cervantes denied tampering with the handcuffs. The court denied his request for an evidentiary hearing about the prior condition of the handcuffs, concluded Cervantes had attempted to escape (we reject, *post*, Cervantes's challenge to this ruling), and ordered that both his hands be restrained during trial. The court suggested that he "sit quietly" if he did not want the jury to see the cuffs.

Each defendant later opted to wear the REACT belt instead of the chains. The trial court later, in accordance with revised county policy, had defendants reaffirm their preference for the REACT belt.

The court later agreed defendants could be free from restraints while testifying.

When Cervantes complained the security staff would not let him wear a tie, a belt, or his own shoes, the court ordered that he be allowed to wear a tie and belt.

B. Analysis

Section 688 provides, "No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge." A defendant may be physically restrained at trial "only if there is a 'manifest need for such restraints.' [Citations.] 'Such a "'manifest need' arises only upon a showing of unruliness, an announced intention to escape, or '[e]vidence of any nonconforming conduct or planned

nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . .' [Citation.] "Moreover, 'the showing of nonconforming behavior . . . must appear as a matter of record . . . . The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.'" [Citation.]' [Citation.] The trial court may not delegate to law enforcement personnel the decision whether to shackle a defendant. [Citation.]" (*People v. Seaton* (2001) 26 Cal.4th 598, 651; accord, *People v. Mar* (2002) 28 Cal.4th 1201, 1216-1217 (*Mar*) [reversed judgment due to improper use of stun belt].) We review the trial court's decision under an abuse of discretion standard. (*Seaton, supra*, 26 Cal.4th at p. 652.)

The trial court did not abuse its discretion. Although it would be wrong to use restraints because of events in Chicago or Atlanta, the record supports the trial court's ultimate conclusion that use of restraints was justified by Cervantes's tampering with the handcuffs, disobedience of custodial officers' orders, display of group mentality (he acted up when his codefendants acted up), and the possession of weapons by group members Arellano and Olague while in custody.

Cervantes argues the trial court abdicated its decision to the sheriff, failed to base the court's decision on any misconduct by Cervantes himself, and focused on only two factors

-- the nature of the charges and county policy. However, the quoted transcript shows the court was referring to security concerns in transporting defendants from the courthouse across the street to the jail.

Cervantes suggests it was improper for the court to consider him part of a group acting as a gang, rather than an individual. However, an individualized assessment of a defendant properly takes into consideration that the defendant misbehaves when he is in a group with his codefendants.

Even assuming abuse of discretion, there is no prejudice warranting reversal.

If physical restraints are not visible to the jury, the *Watson* standard (*People v. Watson* (1956) 46 Cal.2d 818 (*Watson*)) is used to assess prejudice. (*Mar, supra*, 28 Cal.4th at p. 1225, fn. 7.) Even if we use the *Chapman* standard, as urged by Cervantes, we see no basis for reversal. There is no evidence the physical restraints were visible to the jury inside the courtroom. The jury did eventually learn restraints had been used, when evidence was adduced that Cervantes tampered with his handcuffs, but by that time all defendants were wearing REACT belts rather than handcuffs, and there is no evidence the jury saw any restraints.

Cervantes argues there is an inference that the jurors saw the chains in the courtroom, because after Cervantes attempted escape in September 2005, he was no longer permitted to wear a

single handcuff, and his restraints must have been visible to the jury because the court said, "I suggest that he sit quietly and not display his cuffs to the potential jurors . . . if [he] does not want them to see them." We do not infer that Cervantes brought attention to the cuffs.

Even assuming for the sake of argument that the jurors could see the restraints in court and even assuming a *Chapman* standard, we see no prejudice. The evidence of guilt was strong.

Cervantes argues that, regardless whether the jurors actually saw the restraints, the "true prejudice" in this case was the psychological effect of the restraints on him during trial. However, he fails to show any psychological effect. He merely points out his chair did not have wheels, and he claims, without any supporting evidence, that "every time [he] wanted to confer with his counsel he would have had to adjust his fixed chair in order to lean over, get closer, and whisper to counsel, and he would have been distracted from the testimony at trial by the effort to keep his chains from rattling while he did so."

We conclude Cervantes fails to show grounds for reversal based on the use of physical restraints.

V. Courtroom Security

Cervantes argues there was excessive security in the courtroom. He fails to show grounds for reversal.

A. Background

Six officers (three of whom wore plainclothes) were present in the courtroom when defendants wore stun belts. When the belly chains were used, there were eight uniformed deputies in court. One deputy for each defendant sat directly behind defendants. Two metal detectors were used -- one at the courthouse entrance, the other at the courtroom entrance -- due to the nature of the trial and prior incidents of weapons being smuggled into the courthouse in unrelated cases. During defendants' testimony, a uniformed officer sat at the prosecution table.

B. Analysis

A trial court has broad discretion to maintain an orderly and secure courtroom, and its security measures are reviewed under an abuse of discretion standard. (*People v. Ayala* (2000) 23 Cal.4th 225, 253.) The presence of armed guards in the courtroom need not be justified, unless they are present in unreasonable numbers. (*Holbrook v. Flynn* (1986) 475 U.S. 560, 568-569 [89 L.Ed.2d 525] [armed guards in public places are taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm]; *People v. Duran* (1976) 16 Cal.3d 282, 291, fn. 8.) The use of metal detectors in courthouses need not be justified. (*People v. Jenkins* (2000) 22 Cal.4th 900, 997.)

Assuming the contention is not forfeited for failure to obtain a ruling in the trial court, Cervantes on appeal fails to show abuse of discretion. He says the judge abdicated his discretion to the sheriff's department. We disagree. Although the court and security officer made comments about the sheriff being responsible for security, there were also comments that the sheriff made recommendations to the court. The court could properly consider the recommendations of the sheriff's department.

Cervantes suggests eight uniformed officers were too many, but he provides us with no evidence of the size of the courtroom or where they stood or sat. Moreover, only six officers (three of whom wore civilian clothes) were present for most of the trial, after defendants opted for the stun belts.

Cervantes says the jury must have figured out that the three men in civilian clothes sitting directly behind defendants every day were security officers. We disagree. Perhaps they could have been viewed as part of the defense team.

Regarding the second metal detector, even assuming the jurors (who did not have to pass through the second screening) were aware of it, Cervantes fails to show grounds for reversal. He merely asserts, without legal support, that the second detector could not be used absent proof that a member of the public intended to smuggle a weapon or other contraband into court.

We see no abuse of discretion regarding courtroom security.

VI. Claims of Evidentiary Error

Defendants make numerous claims of evidentiary error, all of which, according to defendants, rose to the level of constitutional violations. We shall conclude any evidentiary error was harmless (individually and cumulatively).

A. Admission of Evidence Re Christina Marten

1. Calling Marten to the Witness Stand

Arellano contends the trial court erred in permitting the prosecutor to "parade" Marten before the jury in jail garb (she already had been found guilty in her severed trial), knowing she would refuse to testify, and the error denied Arellano due process, a fair trial, and the right to confront witnesses. Even assuming Marten was in jail garb (an assertion unsupported by any citation to the record), we see no grounds for reversal.

In response to defense in limine objections, the prosecutor said he would not "make any statements about [Marten's] testimony whatsoever" in opening statements if no deal had been reached with Marten. The prosecutor said, "we don't intend to mention Christina Marten in our opening unless we have already made a deal, *as far as what she would say*." (Italics added.)

In his opening statement, the prosecutor described the roles various people played in the crime, and said, "Christina Marten was Robert Stepper's friend. It was her job to make sure that Stepper went where he was supposed to go, that he walked

into the ambush. [¶] . . . [¶] Now, as I mentioned, Richard[,] Nate and Gilberto have all made deals and will testify. As far as Christina Marten goes, we intend to call her as a witness. No deals have been made with Christina Marten."

At the recess, defense counsel moved for a mistrial and asked the court to cite the prosecutor for misconduct for mentioning Marten. The prosecutor said he kept his promise, which was that he would not disclose the substance of Marten's past statements and expected testimony. The court deferred the matter.

Later during trial, Marten's attorney said Marten refused to testify in defendants' trial. The prosecution said she had no choice. Her trial was over and, though her appeal was pending, the prosecutor intended to grant her immunity for anything she said in this trial. If she refused to testify, she could be held in contempt (though it would not matter, since she already was serving a sentence of life in prison without possibility of parole). The jury was entitled to see her and observe her.

Defense counsel argued Marten retained a Fifth Amendment right while her appeal was pending, and they invoked case law that the better practice is to have a witness invoke the Fifth Amendment outside of the jury's presence. The prosecutor said she could invoke the Fifth Amendment outside of the jury's presence, and then he would grant her immunity and call her as a

witness. Arellano's lawyer said Marten would refuse to be sworn. The prosecution called Marten to the stand, outside of the jury's presence. She refused to take the stand and refused to take the oath.

After further discussion, Marten was called as a witness in front of the jury and refused the court's order to be sworn in. The court instructed the jury (consistent with section 913), "You, the jury, are not, and may not, speculate or draw any inference from the exercise of her refusal to be sworn as a witness. You may not draw any inference or speculate as to the credibility of any witness or as to any matter at issue in the trial. You must disregard that in its total."

Out of the presence of the jury, the trial court said, "Normally we wouldn't let you call her. I let you call her in this case because under the particular circumstances of this case I felt then and I still do, she is a material witness, her name has been bandied about all the way through this trial. [¶] The jury had a right to understand at least the district attorney made a good faith effort to call her. That is the end of it. Otherwise I wouldn't have let you call her at all."

On appeal, the defense contention is that there was no reason whatsoever to allow the prosecution to call a convicted conspirator who was refusing to testify, then abruptly tell the jurors not to consider the appearance. Arellano does not cite evidence that the jury was told Marten was already convicted;

rather, he says the jurors could not help but infer that she had probably been convicted already. Arellano argues, "Evidence Code section 352, section 913, and case law preclude parading witnesses asserting the Fifth Amendment before the jury; if it does occur, a limiting instruction is required upon request." Although Marten did not invoke the Fifth Amendment (she refused to be sworn in), defendant argues it should be treated the same.

However, a limiting instruction *was* given in this case, and none of Arellano's cited authorities supports reversal.

Thus, Evidence Code section 352 gives the trial court discretion to exclude evidence that is more prejudicial than probative. Section 913 says counsel may not comment on, and the trier of fact may not draw any inference from an exercise of a privilege as to the credibility of the witness or any matter at issue in the proceeding. Arellano cites *People v. Frierson* (1991) 53 Cal.3d 730, where the defendant in the penalty phase of a capital murder case claimed a third party, rather than defendant, committed a prior murder. Outside the jury's presence, the third party asserted the privilege. The trial court denied a defense request to have the person assert the privilege in front of the jury. The defense nevertheless called the person as a witness, and he asserted the privilege in front of the jury. Despite getting what he wanted, the defendant argued on appeal that the trial court erred in its ruling. The Supreme Court said, "Allowing a witness to be put on the stand

to have the witness exercise the privilege [against self-incrimination] before the jury would only invite the jury to make an improper inference. [Citations.] Therefore, 'it is the better practice for the court to require the exercise of the privilege out of the presence of the jury.' [Citation.]" (*Frierson, supra*, 53 Cal.3d at p. 743.) The Supreme Court has commended this approach as a means by which to avoid the potentially prejudicial impact of the witness asserting the privilege before the jury. (*Ibid.*) However, *Frierson* found no prejudice warranting reversal.

The other cases cited by Arellano (without discussion) do not help him. (*Namet v. United States* (1963) 373 U.S. 179 [10 L.Ed.2d 278] [no prejudicial error under the circumstances]; *Bowles v. United States* (D.C. Cir. 1970) 439 F.2d 536, 541-542 [no error in trial court's directive that counsel refrain from mentioning that witness invoked the Fifth Amendment outside the jury's presence]; *United States v. Maloney* (2d Cir. 1959) 262 F.2d 535, 538 [reversed because no limiting instruction was given].)

Here, Arellano fails to show any prejudicial impact in this case. He claims jurors could not help but infer Marten was an independent (non-pleading, non-informant) defendant and intimate of Arellano who (as the prosecutor stressed) admitted she set up Stepper and led him to his death; was an accomplice as a matter of law; doubtless had outside information confirming the

accomplice conspiracy claims; had probably been convicted already; and was refusing to reveal her independent outside knowledge, probably out of fear or favor of Arellano or his gang. However, the factual matters were adduced through other evidence, the claimed inferences are speculative overreaching by Arellano, and the court gave the jury the limiting instruction.

2. Marten's Declaration Against Interest

Arellano also complains the trial court admitted into evidence, as a declaration against interest, Marten's hearsay statement to her father implicating herself. We see no error.

After the trial court found Marten unavailable as a witness, it allowed the prosecution to adduce evidence (over defense objection) from Marten's father that, after Marten testified before the grand jury, she told him that she told the grand jury that she set up victim Stepper by walking him to the place where he would be assaulted. The father admitted he testified in an earlier proceeding that Marten also said, "Oscar [Cervantes] and James [Olague] were in front of her, right behind her [*sic*]." The father said he started crying, and she immediately retracted her statements and said she was taking a shower when the shots were fired and knew nothing about it. At the time of the shootings, Marten lived on the streets because she could not live with her father's no-drug policy. She does drugs and does not always tell the truth. The father said Marten said she lied to the grand jury in an attempt to help

herself get out of jail. In admitting the evidence, the trial court found reliability, stating she would not have implicated herself to her father if it were not true.

The proponent of a declaration against penal interest (Evid. Code, § 1230[9]) must show the declarant is unavailable, the declaration was against the declarant's penal interest when made, and the declaration was sufficiently reliable to warrant admission despite its hearsay character. (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611.) *People v.* (*Ubaldo*) *Cervantes* (2004) 118 Cal.App.4th 162, said there is some disagreement as to whether a ruling on a declaration against interest should be reviewed for abuse of discretion or de novo review of the totality of the circumstances. (*Id.* at p. 174.) Applying the standard more favorable to defendants, we see no error.

Arellano argues the standard was not met because Marten was not confiding in her father but was merely repeating what she said to the grand jury (which she immediately told him was false). However, she was repeating a statement made under oath. Arellano argues Marten did not subject herself to any *increased*

---

[9] Evidence Code section 1230 states, "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

liability by merely repeating a statement she had already given to authorities. However, the cases cited by Arellano (without discussion) do not require that a declaration against interest *increase* liability. (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1678; *People v. Blankenship* (1985) 167 Cal.App.3d 840, 848 [trial court properly precluded defendant from testifying that his cellmate, awaiting trial on a different robbery/murder, admitted committing the crime]; *People v. Shipe* (1975) 49 Cal.App.3d 343, 354 [dictum: reliability lacking where declarant made statement after arrest for serious offense or guilty plea to lesser offense and is awaiting sentencing and statement is exculpatory in the sense declarant admits complicity to lesser degree and blames coparticipant for a greater offense].)

Arellano argues the prosecutor erroneously urged external corroboration as grounds for special reliability. Arellano apparently refers to the prosecutor's comment, "Certainly more than enough [was] presented in trial to back up the reliability of that statement." However, that comment was made *after* the trial court already ruled and *after* the court answered "yes" to defense counsel's request for confirmation that the court found the statement trustworthy.

In addition to implicating herself, Marten's statement also implicated "Oscar and James" (Cervantes and Olague). Cervantes and Arellano (with joinder by Olague) contend that declarations against penal interest should be limited to declarations against

the interests of the declarant and should not extend to collateral assertions against others. The defense raised this point in the trial court, where they argued Marten's declaration against interest would be admissible only as against her, and her statement implicating these defendants should be redacted under *Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2d 476] and *People v. Aranda* (1965) 63 Cal.2d 518.

However, on appeal, defendants fail to acknowledge and address the authority cited by the People in the trial court and on appeal -- *Cervantes, supra*, 118 Cal.App.4th 162 -- which held admissible, as a declaration against interest, one defendant's hearsay statement to a friend, attributing blame to the codefendants but accepting for himself an active role in the crimes. (*Id.* at p. 175.) His statement that a codefendant shot the first male, as well as his statement that he (the declarant) shot at the second male, both incriminated the declarant, because he was acting in concert with the codefendant at all relevant times. (*Id.* at p. 176.) A declaration against interest may be admitted in a joint trial so long as the statement satisfies the statutory definition and otherwise satisfies the constitutional requirement of trustworthiness. (*Id.* at p. 177.)

Here, Marten's statement about Oscar and James being there did not expressly assert they were involved. To the extent the statement implied they were involved, the statement was against

Marten's own penal interest because she was working in concert with them.

We conclude the entire statement was properly admitted as a declaration against interest.

Even assuming for the sake of argument that the evidence should have been excluded, any error was harmless. (*People v. Samuels* (2005) 36 Cal.4th 96, 121 [applying *Watson* standard].) Others testified they saw Cervantes do the shooting, and Olague made admissions to a jail mate connecting himself to the murders.

We see no reversible evidentiary error regarding Marten.

B. Jailhouse Informant

Cervantes and Arellano contend the trial court erred in denying their motion to exclude testimony from jailhouse informant Richard Bowie. We disagree.

1. Background

Arellano moved in limine to exclude Bowie's testimony, based on *Massiah v. United States* (1964) 377 U.S. 201, 206 [12 L.Ed.2d 246], which held that statements deliberately elicited from charged defendants by a jailhouse informant acting as a police agent violate the Sixth Amendment right to counsel and are inadmissible. The trial court heard testimony from Bowie (who was in jail on charges of attempted escape with two strikes), jail employees, and police officers, that Bowie initiated the contact with law enforcement, said he may have

some information about the murders, asked if he could receive some consideration in his own pending case, and was told no -- no promises or consideration could be made, and if he came upon information he was acting of his own accord. A month later, Bowie again initiated contact and turned over his handwritten notes regarding his contacts with defendants. The officers took the information and repeated there were no promises or consideration, and they were not asking Bowie to seek out information. Bowie had not previously acted as a police informant.

Bowie ultimately obtained a plea agreement for his truthful testimony in this case.

The trial court found there was no *Massiah* violation; no deals were offered or contemplated; the jail duty which placed Bowie in contact with defendants was already his assigned duty and was not arranged to facilitate his acting as informant; and whatever hope Bowie had of making a deal was not encouraged by law enforcement. The trial court accordingly denied the motion to exclude Bowie's testimony.

Bowie testified at trial that he asked Cervantes how he could kill somebody in cold blood, and Cervantes said, "Once a shot's called, it's called." Bowie said Cervantes said he got rid of the gun by tossing it in the river. In jail, Bowie transported messages between Cervantes, Olague and Arellano.

2. Analysis

In order to prevail on a *Massiah* claim, the defendant must demonstrate that the informant (1) acted as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of a benefit or advantage, and (2) deliberately elicited incriminating statements. (*In re Neeley* (1993) 6 Cal.4th 901, 915.) It is not the government's intent or overt acts that are dispositive; rather, it is the likely result of the government's acts. (*United States v. Henry* (1980) 447 U.S. 264, 271 [65 L.Ed.2d 115].)

Here, Bowie elicited incriminating remarks, but there was no preexisting arrangement, no government direction, and no government act from which Bowie could reasonably expect a benefit.

Defendants claim this was a case of transparent plausible deniability, "a wink and a nod" between government and informant. They cite *Randolph v. California* (9th Cir. 2004) 380 F.3d 1133, which held a jailhouse informant was acting on behalf of the State, where there was sufficient undisputed evidence that the State "made a conscious decision to obtain [the informant's] cooperation." (*Id.* at p. 1144.) The Ninth Circuit remanded to the trial court for further factfinding as to whether there was a *Massiah* violation. (*Id.* at p. 1147.) Here, defendants fail to cite any undisputed evidence of a conscious

decision by the government to obtain Bowie's cooperation. Thus, *Randolph* is distinguishable, and we need not address the People's argument that it conflicts with California authority.

Admission of Bowie's testimony does not afford grounds for reversal.

C. Admission of Evidence - Accomplices/Accessory

Cervantes and Arellano argue the trial court improperly denied repeated motions to exclude as unreliable the collective testimony of accomplices (Betancourt, Easlon, and Lopez), an accessory (Veronica Lugo, who told some she was the getaway driver, and jailhouse informant Bowie whom we have already addressed), all of whom were "paid" (via favorable plea bargains) to testify for the prosecution. We shall reject the arguments.

1. Background

Eight months after the shootings, Marten began serving six months in jail on an unrelated matter. She decided jail was "not fun" and offered to trade information about the Halloween shootings to help herself. An officer said, "if people help solve that case, I guarantee they will get favorable consideration." However, that did not work out for Marten (who was ultimately convicted in a separate trial), and she did not testify in this trial.

Betancourt, Easlon, Lopez, and Lugo each entered a plea agreement with the District Attorney in exchange for truthful testimony in this case.

Defendants made various unsuccessful motions (to exclude, strike testimony, dismiss, and motion for new trial) in an attempt to exclude evidence from those who negotiated dispositions in exchange for testimony. Defendants argued the testimony was unreliable because the police were desperate to close this case and pressured these people to make confessions that fit the prosecution's factual scenario. Defense counsel submitted a declaration that Easlon told a defense investigator his confession was perjury induced by coercion. The trial court concluded the evidence should be submitted to the jury.

2. Analysis

The trial court's evidentiary rulings are reviewed for abuse of discretion. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167.)

Cervantes acknowledges the general rule that it is up to the jury to decide what effect, if any, a plea bargain has on a prosecution witness. (*People v. Andrews* (1989) 49 Cal.3d 200, 231, 260; *People v. Westmoreland* (1976) 58 Cal.App.3d 32, 47.) Although there is a certain degree of compulsion inherent in any plea agreement or grant of immunity, an agreement requiring only that the witness testify fully and truthfully is valid. (*People v. Morris* (1991) 53 Cal.3d 152, 191, overruled on other grounds

in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) It is not improper to delay sentencing until after the witness has testified. (*People v. Klaess* (1982) 129 Cal.App.3d 820, 822.)

Cervantes argues this case is different, because no other published cases address the same situation where so many accomplices, accessories and informants "turned" in exchange for favorable deals with such extreme penalty reductions. For example, Easlon pled no contest to one count of voluntary manslaughter and one count of active participation in a criminal street gang with the condition that he receive a sentence of six years, eight months. Betancourt pled no contest to accessory after the fact and was sentenced to three years in prison. Lopez pled guilty to voluntary manslaughter and gang participation and received a sentence of six years, eight months. Lugo received no jail or prison time.

Cervantes says the evidence should have been excluded based on the collective unreliability of their testimony due to coercive plea agreements they entered into in exchange for such testimony. Cervantes claims a due process violation and argues we should apply de novo review to determine the plea agreements were invalid because, despite their express terms demanding only truthful testimony, the circumstances were coercive, in that the agreements said they would not be sentenced until after they testified.

We do not find the agreements coercive. The defense theory that the police coerced the accomplice testimony did not require exclusion. The defense could and did present their case to the jury that the testimony was unreliable.

Cervantes argues there was prosecutorial pressure on the accomplices' family members who were defense witnesses, not to impeach the accomplices' testimony and thereby jeopardize the plea bargains. Other than arguing ongoing coercion, Cervantes fails to show how this is material to the admissibility of the accomplice testimony, but we address the matter *post* in our discussion of defense claims of prosecutorial misconduct.

We see nothing improper in the trial court's admission of the evidence. Additionally, the trial court instructed the jury to view with caution the testimony of accomplices and informants and to consider the extent to which the testimony may have been influenced by the expectation of benefits.

D. Jury Viewing of Crime Scene

Cervantes and Olague complain the government "altered" the crime scene before the jury viewed it, by posting "No Parking" signs on one side of the street. They argue the trial court improperly denied their request for a mistrial. They also include this issue in their claim (which we address *post*) that prosecutorial misconduct justifies dismissal. We see no grounds for reversal.

In limine, the trial court denied a defense request for the jury to view the crime scene (at night) in order to see the layout. The court stated it saw the street after presiding over Christina Marten's trial, and there were significant changes in trees and shrubs, and a house and fence had been built since the crimes.

Easlon testified he hid at one end of Oak Avenue, as he had been instructed. He saw Marten arrive with Stepper and leave alone. Easlon saw Cervantes and Olague pass by. Olague stayed on the south side of the street. Cervantes crossed to the north side, at which point a tree blocked Easlon's view. Easlon ventured further down the sidewalk. He saw Cervantes cross back to the south side of the street and walk quickly to the back of the truck, where Easlon saw silhouettes of people. Easlon saw flashes and heard gunshots. Easlon said he saw Cervantes run away. However, Easlon also said that, after Cervantes and Olague passed him, all Easlon could distinguish was their bodies (i.e., he could not necessarily identify them). The evidence showed there was no moon that night.

The trial court granted (over the prosecutor's objection) a defense request for a jury view of the crime scene at night, despite the fact things had changed (a house and fence had been built, shrubs had grown, etc.). The issue in the court's view was whether Easlon, from his vantage point, could have seen a

silhouette of a person near the driveway down the street. Defendants waived their right to be present.

When the jury was brought to the crime scene (on a night with no moon, like the night of the crimes), the defense objected the government had altered the scene, without notice, by placing temporary "No Parking" signs on the south side of the street. However, the defense did not ask the court to cancel the jury view. Rather, Olague's lawyer said, "I don't know what to say right now. I probably will have a heck of [a] lot more to say tomorrow. But I want that on the record that I object to what's going on right now." The court assumed parking was restricted for security reasons and allowed the jurors to walk around and watch a person walk down the south side of the street, cross diagonally and walk on the north side, and then cross back to the south side and stop at the particular driveway. The court told the jurors, "We're not going out tonight to try to recreate, say, this is what it was that night, or anything else. It's just to give you an assist in terms of what you might or might not be able to see."

The next day, the defense requested a mistrial on various grounds, including government manipulation of the crime scene. Evidence had been adduced that 11 cars were parked on the south side of the street at the time of the crimes. (Despite the People's assertion of the prosecutor's uninvolvement, it was unclear whether the police acted independently or at the

prosecutor's direction. The court said it "got the impression" the police did it on their own. There was no showing they acted in bad faith. Defense counsel merely argued their view, if it were done for security reasons, parking should have been blocked on both sides of the street. The court was "bothered" by the fact the signs were placed without the court's approval or knowledge. Nevertheless, the court did not think it tainted the jury view and denied a mistrial. Whether cars were parked on the street did not block the view down the sidewalk.

At the close of the prosecution's case in chief, the defense requested another jury view or a mistrial, citing prosecutorial misconduct including manipulation of the crime scene. The court denied the requests.

The defense later tried again. The trial court allowed the defense to call as a witness a private investigator, James Peoples, who said a .22 caliber gun does not display an observable flash of light. He also said such a gun would emit a burning powder, which would be an "observable event" at a distance of 20 feet but not 300 feet, but he had never fired a "sawed off" .22 gun.

The trial court said counsel could argue to the jury that the absence of cars made a difference, but they could not argue to the jury that the prosecutor altered the scene in an attempt to affect the jury view, because there was no evidence of bad faith.

On appeal, defendants argue the trial court abused its discretion in permitting the jury to view the "dissimilar" crime scene. They cite authority that changes in a crime scene do not automatically preclude a jury view, and allowing a jury view is not an abuse of trial court discretion if the changes are not material. (*People v. Perkins* (1937) 8 Cal.2d 502, 515; *People v. Pompa* (1923) 192 Cal. 412, 421.)

Defendants do not claim the trial court should have cancelled the jury view. Rather, they claim the trial court should have granted a mistrial. To the extent they claim evidentiary error on appeal, the matter is forfeited, because they never asked the court to cancel or postpone the jury view, nor did they move to exclude or strike the evidence (Evid. Code, § 353). Although they objected to the parking restriction at the scene, they did not object to the jurors' seeing the evidence (the crime scene).

To the extent defendants claim the trial court was required to declare a mistrial, we disagree.

A trial court should grant a mistrial only when the defendant's chances of receiving a fair trial have been irreparably damaged; the standard of review is abuse of discretion. (*People v. Williams* (2006) 40 Cal.4th 287, 323.)

Before addressing defendants' contentions, we observe the People argue defense counsel earlier implied they were not concerned whether cars were parked on the street during the jury

view. However, that was when the defense requested in limine for the jury view in order for the jurors to see the layout -- a request denied by the trial court. When the trial court ultimately decided to allow the jury view, the prosecutor stated his understanding (which defense counsel did not dispute) that the reason for the view was for the jurors to see what they can see at night, and it would be irrelevant that conditions had changed and "that cars won't be there or will be there." We disagree with the People's position that defendants are therefore estopped from complaining because they knew the scene would not be the same. The defense was willing to accept the scene as they found it; they did not know about or agree to the parking restrictions.

Olague contends the government's manipulation of the crime scene was outrageous misconduct and a criminal offense under section 182, subdivision (a)(5), which makes it a crime for two or more persons to conspire "[t]o commit any act . . . to pervert or obstruct justice, or the due administration of the laws." However, defendants fail to show any act or intent to obstruct justice or even any evidence of bad faith -- by the prosecution or the police as its agents. Defendants merely repeat their assumption that the parking restriction could not have been for security reasons, because the police allowed parking on the north side of the street. The assumption is unsupported by evidence and facially flawed. A parking

restriction could be limited to one side of the street as a compromise between enhancing visibility for security reasons and minimizing inconvenience of the residents.

Cervantes points out that the trial court and prosecutor mentioned the inability to recreate the exact scene regarding parked cars as a reason supporting denial of the initial request for a jury view. But that does not make the absence of cars grounds for a mistrial.

Cervantes claims that, because a jury view is a critical stage of the proceedings, the claimed error implicates federal constitutional rights, requiring reversal unless harmless beyond a reasonable doubt. However, not every error during a critical stage of proceedings constitutes federal constitutional error. In any event, even if the *Chapman* standard applied, reversal would not be warranted.

E. Admission of Evidence - Gang Expert

Arellano contends the trial court abused its discretion in allowing the gang expert to testify on two issues of ultimate fact and intent, i.e., gang benefit from the crimes, and natural and probable consequences of a gang attack. Olague contends the trial court improperly allowed the gang expert to use Marten's statement that Olague was present at the pre-Halloween meeting as a basis for expert opinion that Olague was a Sureño "shot caller." Cervantes joins, except as to natural/probable

consequences (since he was tried as the shooter). We see no grounds for reversal.

1. Gang Benefit

Arellano complains that, in direct examination of the expert, the prosecutor framed questions with specific reference to this case, rather than using hypotheticals. Thus, the prosecutor asked (1) why the expert agreed with the allegation that the crime was committed in part for gang purposes; (2) how this killing would benefit the Norteños; (3) whether it was a personal benefit for Arellano; and (4) how the Sureños benefited from this killing.

However, defendants did not object during trial, and the contention is therefore forfeited. (Evid. Code, § 353.) We decline the request that we consider the matter despite the forfeiture.

Arellano alternatively argues ineffective assistance of counsel for counsel's failure to object. To prevail, he must show that his counsel's performance fell below professional standards and that a more favorable result was reasonably probable absent the deficiency. (*Strickland v. Washington* (1984) 466 U.S. 668, 689; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) Arellano argues deficiency and prejudice are shown because the claims are meritorious, the potential for prejudice apparent and, since related objections were raised, there was no tactical reason for counsel not to object.

Arellano says section 29 prohibits an expert from offering an opinion on the ultimate question of intent, knowledge, mental state, or reasonableness. However, section 29 speaks only about an expert "testifying about a defendant's mental illness, mental disorder, or mental defect . . . ," none of which was applicable here.

Insofar as defendants complain the expert testified about an ultimate issue to be decided by the jury, "Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805.) Even assuming counsel should have objected, it is inconceivable that defendants would have obtained more favorable verdicts had the questions been framed as hypothethicals.

We see no basis for reversal regarding expert opinion of gang benefit.

2. Natural and Probable Consequences

Arellano offers the following quotation from the expert's testimony:

"[Prosecutor]: Do you have an opinion as to whether -- well, hypothetical, if a shot caller in the Norteño gang gives an order for a violent assault on an underling, somebody who hasn't been paying their debts or has disrespected that shot caller, it is a natural and probable consequence that somebody may be murdered as a result of that order for violent assault?

"[Cervantes's attorney]: Objection. Calls for a legal conclusion.

"[Arellano's attorney]: Not to mention speculative.

"[Olague's attorney]: Beyond the scope of his expertise.

"THE COURT: Overruled. All three objections are overruled.

"THE WITNESS: Yes, sir.

"[Prosecutor] Why?

"A Because in my training and experience, as well as my personal involvement investigating felony assaults, especially dealing with gang members, they will often times use weapons. Their assaults, again, are often times in retaliation for disrespect. That retaliation usually is an increased assault on the person, and with the fact that they gain respect by the severity of the assaults they commit and the use of weapons. Often times it is likely anyone that understands the gang culture is involved in gangs realizes that when he commits an assault, or if someone else within their gang commits an assault, it is likely to lead to great bodily harm, including death."

Arellano argues the expert was wrong, and even Lopez and others thought murder and attempted murder were unlikely consequences of internal gang disputes. However, defendants were free to argue the expert was wrong. They were not entitled to exclude the expert's opinion. Arellano argues the expert's

opinion intruded into improper assertions of defendants' mental state and other ultimate facts. However, "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805.) Arellano argues the expert was unqualified to give an opinion on these matters. However, no one objected on that basis, and Arellano fails to prove his point on appeal.

Arellano claims the errors regarding the expert, compounded by closing arguments to the jury and a faulty gang instruction (discussed *post*), were prejudicial. The People agree the prosecutor went too far in closing argument by saying murder would be a natural and probable consequence of *simple* assault, whereas the expert's testimony related only to *violent* assault. However, we do not accept the concession. Although the prosecutor did make reference to "an assault or assault by means of force," his position was clear that this was a violent assault by means of force.

Arellano fails to show grounds for reversal regarding the gang expert.

3. Shot Caller

Olague complains the expert was allowed to testify Olague was a gang "shot caller." We see no grounds for reversal.

Olague's attorney asked the gang expert, Sergeant Gill, "What's this leadership role you're talking about that Mr.

Olague is supposed to be taking?" Gill answered, "According to Christina Marten, he actually had met with Neto [Arellano] in the apartment, had discussed -- [¶] . . . [¶] . . . Christina Marten, during her statement to me, indicated that he was the go-between between Candy Garza who, again, would be in a higher status, in my opinion, than Mr. Olague, and he was dealing with the Sureño side of things and was there for -- with Oscar [Cervantes] when the incident occurred." Cervantes objected to the reference to him, but Olague did not object. Gill stated that other witnesses in the investigation had said the same thing. Gill testified, without defense objection, that Marten said she was selling drugs for Arellano. Later, at Olague's request, the court indicated it would instruct the jury that hearsay in the expert's testimony was offered not for the truth of the matter but simply as a foundation for the expert's opinion. The prosecutor agreed, except for statements the expert took from defendants which (according to the prosecutor) should include coconspirator Christina Marten. Olague disagreed regarding Marten.

The court instructed the jury, "you need to understand that experts are allowed to testify on a number of subjects that nonexperts can't testify to. They can base their opinions on any number of things, including hearsay. That hearsay that they're basing their opinion on cannot be used for the truth of the hearsay, Mary Jane told me blah, blah, blah, and I'm basing

my opinion based upon that. He can base his opinion on that, but that doesn't mean that Mary Jane said blah, blah, blah. That's hearsay. [¶] Statements made by the defendants to this officer is [*sic*] not hearsay. That's for the truth of the matter. Statements made by coconspirators to the officer is not hearsay [*sic*], but what Mary Blogett or Henry Jane [*sic*] said to the officer, he's basing his opinion based upon that. That's hearsay and you cannot consider those statements for the truth of the matter stated."

The court asked counsel if that was a fair summary. No one objected.

Over Olague's objection, the court allowed the prosecutor to follow up regarding the information that Olague played a leadership role. The expert answered, "From Christina Marten when she was present when a discussion was about killing Stepper that Olague came to the apartment where Neto was and was involved at the end of that discussion. And she said that Mr. Olague's role, I guess, as you will, or she saw him walking behind her with Mr. Cervantes on the night he [*sic*] was killed." The court sustained an objection as to Cervantes.

The attorneys later agreed Marten's statement to Gill was hearsay and could not be used for truth of the matter asserted, but could be used as a basis for the expert's opinion. Accordingly, the trial court instructed the jury that "[c]ounsel have stipulated that th[e] statements attributed to Christina

Marten [and made] to Sergeant Gill may not be considered by you for the truth of the matter she allegedly stated to him, but may only be considered by you as a basis for his opinion -- he based his opinion on what she told him, that does not make it true. [¶] . . . [¶] Okay. So it may not be considered for [*sic*] you -- for the truth of the matter that it was, in fact, truth but it may be considered for [*sic*] you only as it gives a basis, if any, for Sergeant Gill's opinions as an expert."

On appeal, Olague argues Marten's statement could not be used for any purpose, because it was hearsay and a testimonial statement with no opportunity for cross-examination (*Crawford v. Washington* (2004) 541 U.S. 36.) However, there was no violation if Marten's statement was not used to prove the truth of the matter stated.

Olague argues Marten's statement was used for the truth, and his trial counsel's concession to the limiting instruction constituted ineffective assistance of counsel. Olague also argues Marten's statement was an improper subject of expert testimony because it was unreliable; the expert's opinion of Olague's leadership role was irrelevant to whether he was a gang member (which he had admitted) or an aider/abettor; and it was not beyond the jury's common experience to determine whether Olague aided/abetted the offenses. The People respond that Olague's status as a shot caller was not an element of any offense and was unnecessary to the case. Olague replies this is

even more reason to exclude the evidence, since it was neither relevant nor probative. He also argues Marten's statement was crucial because it linked him to the "Jaime" who brought the gun to Arellano's apartment, whereas Easlon could not say which "Jaime" was coming over with the gun.

While we consider Olague's leadership status material, Olague fails to show grounds for reversal. Even assuming the expert should not have mentioned Marten, any error was harmless because there was evidence from other sources that Olague was Arellano's link to Garza, that Olague accompanied Cervantes to the crime scene, and the expert had prior conversations with Olague in which Olague said he was an "old gangster" and had influence over other Sureños.

F. Admission of Videotape Re Arellano

Arellano complains of admission of a videotape of him participating in a prison riot while incarcerated for a parole violation, almost a year after the Halloween offenses. We see no basis for reversal.

Evidence Code section 1101 says character evidence is generally inadmissible to prove conduct on a specific occasion, but the statute also says it does not prohibit such evidence to impeach a witness or to show matters such as intent, preparation, plan, etc. The analysis turns on (1) the materiality of the fact sought to be proved; (2) the tendency of the uncharged act to prove that fact; and (3) the existence of

any rule or policy requiring exclusion, such as Evidence Code section 352, which gives the court discretion to exclude evidence that is more prejudicial than probative. (*People v. Thompson* (1980) 27 Cal.3d 303, 315.)

On the witness stand, Arellano admitted he was a Norteño gang member and drug dealer, had been to prison as a gang member and was convicted of felony spousal abuse, but he denied being a gang "shot caller" (leader).

After Arellano denied being a shot caller, the prosecutor asked to admit into evidence a three minute video showing Arellano leading a group of individuals to attack others in a prison yard. The relevance was to show he was a gang leader, to impeach his testimony, and to go to the issue of his statements at the pre-Halloween meeting that the lax performance in the drug trade should be handled like they handle things in prison.

The court preliminarily ruled to allow the videotape because it was highly probative, and Evidence Code section 352 was insufficient to exclude it, but the court wanted to view the videotape. After viewing the tape, the court affirmed its ruling, and the video was shown to the jury and used by the prosecution in closing arguments to show Arellano's leadership role in the gang because he led the prison riot.

On the witness stand, Arellano denied that he led the attack. He said he was just following orders to attack. On appeal, Arellano says that, during his penalty trial, a former

Norteño testified he was supposed to be the first one out in front but got scared at the last minute. However, this evidence was not before the trial court when it made the ruling to allow the videotape during the guilt phase of trial.

Arellano argues the videotape showed nothing more than his status as a Norteño and offered nothing more than a visceral shock demonstration of a capacity for violence. We disagree. There was conflicting evidence on the question whether Arellano was a gang leader who had a leadership role in the plan to get Stepper. Arellano said no, the expert opined yes. The videotape was probative of this question. On appeal, both sides argue the video could cut both ways, i.e., a shot caller might be expected to operate behind the scene and let a midlevel soldier lead the actual combat. However, this is a subject for argument to the jury; it does not warrant exclusion of the evidence.

The videotape was properly admitted.

G. Admission of Evidence Re Cervantes

Cervantes complains the trial court improperly admitted evidence regarding his alleged attempted escape and a prior incident of child molestation. He fails to show grounds for reversal.

1. Escape Attempt

When the sergeant informed the court that Cervantes's handcuffs had become compromised, Cervantes denied tampering

with them. The trial court initially denied his request for an evidentiary hearing about the condition of the cuffs when they were last checked. The court characterized it as an escape attempt. Cervantes pointed out the replacement handcuffs also did not lock, and the court said, "This is something that happens with wear and tear."

Several months later, midtrial, Cervantes moved under Evidence Code section 352 to exclude any testimony about the handcuffs or argument about attempted escape as consciousness of guilt. At an Evidence Code section 402 hearing, the sergeant testified handcuffs were used while defendants were transported between the courthouse and jail. Inmates do not necessarily get the same handcuffs every day. While being transported, defendants were also chained together. On the day in question, September 20, 2005, Cervantes wore the same handcuffs all day. He was allowed to have one hand free while in the courtroom and during lunch. When the sergeant removed the handcuffs at the end of the day, he noticed one of the locking jaws was bent. A person with enough flexibility and strength could manipulate the locking jaw from one handcuff to go behind the other, twist the wrist, and spread the cuffs apart to be removed. The sergeant opined defendant could have manipulated the cuff while he had one hand free during the lunch break. The sergeant never questioned Cervantes for his side of the story.

Defense counsel argued there was no evidence Cervantes tampered with the handcuffs and, even if there was, there was no evidence of an escape attempt.

The trial court concluded there was enough evidence to submit to the jury, and the sergeant testified in front of the jury. He said the cuffs, as altered, presented security concerns because they could be used to inflict injury on a deputy, allowing defendant to reach for the deputy's gun and use people in the courtroom as hostages to try to escape. Cervantes notes the sergeant was unable to break a pair of handcuffs in a demonstration on cross-examination.

The People filed a complaint charging Cervantes with attempted escape (§ 4532, subd. (b)(2)), but the case was later dismissed.

On appeal, Cervantes argues the People failed to meet their burden to establish a foundation for the evidence, because they failed to show Cervantes tampered with the handcuffs, and the sergeant did not definitively testify the cuffs were in perfect working order that morning. Cervantes argues perhaps a prior inmate damaged the cuffs, or perhaps they broke through ordinary wear and tear. He notes that, during discussion about restraints, the sergeant said that about 40 pairs of handcuffs are tampered with every year, and they have no idea when that happens.

However, the sergeant testified the cuffs seemed "okay" when he placed them on Cervantes that morning. Cervantes argues that is not good enough, because the sergeant later gave trial testimony that there is no protocol for his deputies to follow to ensure that handcuffs are in working order, and they just assume that if the handcuff is on, it is in proper condition. Also, the sergeant did not testify he had any personal knowledge that the cuffs could be manipulated in the theorized manner; rather, he had heard about such manipulation from agency bulletins. Cervantes argues he could not have tampered with the cuffs in the courtroom without a courtroom deputy noticing (and none did), and a camera monitored him inside the holding cell while he ate lunch, and none of the deputies who monitor the cameras reported anything unusual that day.

These are all matters that Cervantes was free to, and did, argue to the jury. They are not grounds for reversal of the judgment.

We reject the claim in Cervantes's reply brief that the People have conceded this issue in his favor by failing adequately to rebut the point in the respondent's brief.

We conclude the trial court did not err or abuse its discretion in admitting the evidence, there was no constitutional violation, and we need not address Cervantes's contention regarding prejudice.

2. Child Molest Accusation

Cervantes argues the trial court improperly allowed the prosecution to introduce irrelevant and prejudicial "rumor and innuendo evidence" that his sister once accused him of molesting her nine-year-old daughter.[10] We shall conclude the trial court erred, but the error does not warrant reversal of the judgment.

Cervantes made his character an issue at trial by adducing evidence that he was non-violent. Cervantes originally planned to submit a psychologist's assessment that Cervantes was incapable of committing these murders. He decided not to call his expert witness, but the prosecutor wanted to adduce in the guilt phase evidence revealed by the psychologist evaluation, that Cervantes's sister once accused him of molesting her nine-year-old daughter and asked him to move from her home, where he had been staying. Defendant moved to exclude the evidence under Evidence Code section 352. The prosecutor argued it was admissible as a prior inconsistent statement, in that Cervantes testified about traumatic incidents that caused him to move from place to place, yet omitted this traumatic incident. The trial court did not view the evidence as a prior inconsistent statement but suggested it was admissible to impeach Cervantes's character evidence. The prosecutor then argued that child molestation is a violent behavior, and therefore the evidence

---

[10] The girl is sometimes referred to as Cervantes's sister rather than niece. For purpose of this appeal, it does not matter.

was admissible to impeach Cervantes's evidence that he was non-violent. The trial court ruled the child molest admissible.

The prosecutor then elicited from Cervantes on cross-examination that he once had an argument with his sister in which she accused him and another man in her home of molesting her nine-year-old daughter.

On appeal, Cervantes argues there was no evidence that the alleged child molestation involved violence, and child molestation can occur without violence, e.g., section 288, subdivision (a), can be violated by any touching with the requisite intent, and section 647.6 can be violated by conduct directed at a child and motivated by abnormal sexual interest which would disturb or irritate a normal person, even if the child was not disturbed or irritated.

We agree the trial court abused its discretion in allowing the evidence to come in. However, the error did not cause prejudice warranting reversal.

Cervantes argues a state evidentiary rule violates constitutional due process guarantees (thereby invoking a *Chapman* standard of prejudicial error) where, as here, it is used to allow the prosecution to paint a defendant as a bad man prone to commit sex offenses based on live, inflammatory testimony. However, Cervantes does not point to any specific remarks by the prosecutor to the jury on this point. The only testimony was Cervantes's testimony on cross-examination that

his sister once accused him and another male of molesting her daughter. Cervantes and his sister both decided he would move out. The testimony takes up only a page and a half out of thousands of pages of trial transcript.

There was no constitutional violation, and we therefore apply the *Watson* standard of prejudice. (See *People v. Whitson* (1998) 17 Cal.4th 229, 251 [test for prejudice from erroneous admission of evidence is that in *Watson, supra,* 46 Cal.2d 818, 836]).

Cervantes argues the true prejudice was not that the jury would think he was violent but that, even if the jurors believed the defense evidence that he was non-violent, they would decide to punish him for the uncharged child molest. Cervantes cites case law recognizing that prejudice is minimized when the jury knows a defendant has already been punished, via conviction, for a prior bad act. However, that does not mean evidence of uncharged acts is prejudicial.

Cervantes argues the error distracted defense counsel during re-direct examination from its main task of convincing the jury of his alibi, his non-violence, and the third party culpability, because Cervantes had to deny ever molesting his niece. However, it took only one page of reporter's transcript for Cervantes to testify on re-direct that he did not molest the girl, and he moved because he did not want to stay there if his sister could think he was capable of such a thing.

The evidence of the uncharged molest was minimal. The evidence of Cervantes's guilt of the charged offenses was strong. We are satisfied that the error in admission of the uncharged molest was harmless under the test of *Watson, supra,* 46 Cal.2d at page 836.

H. Exclusion of Eyewitness Identification Expert

Cervantes and Arellano argue the trial court erred or abused its discretion in excluding a defense expert on eyewitness identification. We see no basis for reversal.

Cervantes moved in limine to preclude the surviving victims from any in-court identification of him as perpetrator, because they were unable to identify him in prior photo lineups, Valdez misidentified someone she saw in a store, and in-court identification would result from suggestibility rather than recollection, in that Cervantes was the only one left on trial whose photo was included in the lineups.

Cervantes did not obtain a ruling on the motion.

At trial, the prosecutor asked surviving victim Jessica Valdez to look around the courtroom and see if anyone resembled the shooter. She identified Cervantes, though she had been unable to identify him previously. At trial, Valdez said she was mistaken when she told people at the scene that the shooter wore a white sweatshirt, rather than the black clothing described by every other witness. At trial, she was "pretty sure" and then "positive" about her identification.

Previously, during the investigation, Valdez was unable to pick out anyone in six photo lineups. She told the grand jury she was unable to identify anyone but would remember the shooter if she saw him face-to-face. She told the grand jury the shooter stood five feet from her. He wore a hood. He was a brown-haired, 17 to 20 year old Hispanic, five feet, eight or nine inches tall, with a small dark spot under his right eye and no facial hair or glasses. (Other evidence conflicted with her description and indicated Cervantes was 28 years old at the time, bald, with a thin moustache, a little goatee, and glasses.)

At the recess after Valdez's in-court identification, Cervantes's attorney moved for a mistrial, stating he had not received a hearing or ruling on his motion and "obviously" was not going to object during Valdez's testimony.

The trial court denied the motion for mistrial, stating, "The lineup in the courtroom was . . . imminently [*sic*] fair. There were a number of people in the courtroom. There was nothing suggestive in any way. And it is clear when an eyewitness sees something in the flesh is much better than looking at photo lineups."

On cross-examination, Valdez admitted she had talked to people about the case and read articles which identified Cervantes as the shooter.

Cervantes proposed to call as a witness Dr. Robert Shomer, an expert on deficiencies in eyewitness identifications of strangers. The People sought exclusion of the expert, arguing that despite Cervantes's denial of involvement, this was not an eyewitness identification case, because of the conspiracy and other statements implicating Cervantes.

The trial court agreed with the prosecutor and stated, "Here you have significant additional . . . evidence that points to Mr. Cervantes in addition to Jessica Valdez." Defense counsel argued that plea-bargained verification was not independent verification. However, the court said, "There is a whole lot of evidence that connects Mr. Cervantes with this crime independent of Jessica Valdez," though the court said it found her in-court identification "highly powerful and highly credible." The court also noted the testimony of Easlon and others who saw Cervantes at the scene.

After further argument, the trial court said, "There is a whole lot of evidence that connects Mr. Cervantes with this crime independent of Jessica Valdez. [¶] I also found Jessica Valdez's identification of him in court to be highly powerful and highly credible." The court said, "you have any number of witnesses that have testified that he was to be the shooter, that people saw him walk down the street. People saw -- another witness saw him getting in the car saying I got him, I got him, let's go. You got significant independent different testimony

from different people that tie him to this crime. [¶] You can argue in your argument and, well, but they are all coconspirators, they're former defendants, and they're trying to get themselves out of trouble, and that's your argument, but the point is that is still separate evidence of his involvement independent of Jessica's identification in court." The court concluded, "It is not just an identification type of case. It is not an identification case. It is a matter of who do you believe, and what do you believe. I just don't think this is the type of case that eyewitness testimony from an expert is going to be beneficial or of any use. I think if you believe her or not, she's credible or she's not, but there is enough independent separate evidence pointing to Mr. Cervantes to not justify bringing in this expert. It is not necessary."

On appeal, defendants cite *People v. McDonald* (1984) 37 Cal.3d 351 (overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914), which said: "When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (*Id* at p. 377.)

However, the decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion, and such evidence will not often be needed. (*McDonald, supra*, 37 Cal.3d at p. 377.) *People v. Sanders* (1995) 11 Cal.4th 475, at page 509, held the trial court did not abuse its discretion in excluding the expert, where "[a]lthough eyewitness testimony was a key element of the prosecution's case, . . . [it] was not the *only* evidence linking the defendant to the crime. The eyewitness identification was corroborated by other independent evidence of the crime and the conspiracy leading to it." (*Id.* at p. 509.) *Sanders* went on to say that, in any event, no prejudice appeared and it was not reasonably probable the defendant would have received a more favorable result had the expert evidence been admitted. (*Id.* 11 Cal.4th at p. 510.) Defense counsel extensively cross-examined the eyewitnesses and argued the weaknesses of eyewitness identification to the jury, and the trial court instructed the jury to consider the various factors in evaluating eyewitness testimony. (*Ibid.*)

Here too, there was no abuse of discretion, because the in-court identification was not the only evidence linking Cervantes to the crimes, and the identification was corroborated by other independent evidence. In this regard, the independent evidence may come from accomplices. (*People v. Jones* (2003) 30 Cal.4th 1084, 1112.) Cervantes claims the prosecutor argued to the jury

that the eyewitness identification alone sufficed. However, what the prosecutor argued was that the eyewitness identification was "probably" enough, but this was a serious case, which was why the prosecution had presented so much more evidence.

Even assuming abuse of discretion, no prejudice appears. Defense counsel extensively cross-examined Valdez and covered the point in closing argument, and the jury was instructed with CALJIC No. 2.92, factors to consider in proving identity by eyewitness testimony, including whether the witness was able to identify the alleged perpetrator in a photographic lineup.

The exclusion of the eyewitness identification expert does not warrant reversal of the judgment.

I. Exclusion of Evidence Re Third Party Culpability

Defendants argue the trial court improperly excluded some evidence of third party culpability and erred in denying their motion for new trial on this ground, in violation of their constitutional rights to present a defense. We disagree.

1. Background

The trial court conducted an Evidence Code section 402 hearing. The defense called as a witness Rudy Gonzalez, who refused to answer questions. Arellano's investigator, James Peoples, testified regarding an interview he conducted with Rudy Gonzalez in February 2006 (more than three years after Halloween 2002), in which Gonzalez supposedly made statements against his

penal interest. According to Peoples, Gonzalez said he knew Cervantes did not commit the crime and wanted to help because Cervantes has a child. Gonzalez said he and other Sureños decided on Halloween night "to get a buster" (a Norteño). They had no one in mind; it was random. They had guns, including a .22 caliber. Gonzalez said *he stayed home*, while the others drove around in two cars, looking for Norteños. It thus appears, Gonzalez was relating hearsay when he told Peoples the Sureños drove around, came upon the victims, drove around the block, let out one of the Sureños to do the shooting, drove to a park and waited, then returned to Gonzalez's home. Peoples said Gonzalez said he heard on a police scanner the report of gunshots fired. Peoples said that Gonzalez said that Bowie said he was going to use Cervantes to get out of his own (Bowie's) case.

Marcelino Michel, a (former) Norteño who shared a jail cell with David Cordero, testified that Cordero stated in jail that he was drinking at the home of Rudy Gonzalez that Halloween night. Gilberto Lopez, Guillermo Ramirez, and Rudy Gonzalez, Sr., left to "smoke" a Norteño and later returned, acting "weird," after a police scanner in the home reported gunshots fired.

David Cordero took the stand at the hearing and denied making the statements to Michel. Cordero said he was at Rudy

Gonzalez's home that night. There was a scanner there. Cordero drank beer and got beat up.[11]

The trial court ruled Gonzalez's statement was inadmissible because it was not against his penal interest, was not proper third party culpability evidence, was unreliable, and was more prejudicial than probative. (Although Arellano says the trial court erroneously accepted the prosecution's view that admission of Gonzalez's hearsay statement would deny the prosecution's right to cross-examine in a "reverse *Crawford* violation," it appears the trial court ultimately did not rule on that basis.)

At a later hearing under Evidence Code section 402, Mark Estrada refused to answer questions. Carlos Munoz testified he and his friend Estrada were Sureños. According to Munoz, Estrada on the day after the Halloween shootings said that he and his family, which included Rudy Gonzalez, "had something to do with it," "[t]hat they just disposed of the gun" by throwing it off a bridge. When asked if he remembered telling defense investigators that Estrada said his cousin and family did the shooting, Munoz said yes, "I remember him telling me that."

The trial court did not allow Peoples to testify and limited Munoz's testimony, noting Estrada's statement about

---

[11] According to Cervantes's appellate brief, Cordero invoked the Fifth Amendment but said this is what he would say if he were to testify. We see no invocation, but it would not make any difference.

involvement was limited to disposing of the gun and, even if it might subject Estrada to liability as an accessory after the fact or coconspirator, such involvement would not absolve any of these defendants (as required for third party culpability evidence)

In front of the jury, Cordero testified he was at Gonzalez's home on Halloween and got beat up, but he denied telling Michel anything about a shooting.

Michel testified to the jury that, in jail, Cordero said he was at Rudy's house that night; Rudy Sr. left with Gilberto Lopez and Guillermo Ramirez and returned acting strange; while they were gone, a police scanner in the house reported gunshots were fired. Also, Veronica Lugo told Michel that Guillermo Ramirez bragged about being involved in the Halloween murders.

The trial court instructed the jury, "The defendants in this case have introduced testimony for the purpose of showing that another person or persons may have committed or been involved in a separate or different conspiracy, to commit the crimes for which these defendants are here on trial. If, after consideration of all the evidence, you have a reasonable doubt that any or all of these defendants committed any of the crimes charged, you must find that defendant or those defendants not guilty."

The defense moved for a new trial based in part on the exclusion of third party culpability evidence. The trial court denied the motions.

2. Analysis

Evidence of third-party culpability must be admitted when it tends to show that someone *other than* the defendant committed the offense (subject to Evidence Code section 352). (*People v. Hall* (1986) 41 Cal.3d 826, 829.) To withstand exclusion under Evidence Code section 352, the evidence need only be capable of raising a reasonable doubt of the defendant's guilt. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

Since this case involved an uncharged conspiracy between multiple parties, evidence that others may have been culpable would not tend to show that these defendants were not culpable. Moreover, the court did allow some of defendants' evidence.

Defendants argue the trial court erred in excluding the statements of Rudy Gonzalez and Mark Estrada and supporting testimony from Marcelino Michel (that Cordero said an unknown person said they were going to "smoke" Norteños). Defendants think the excluded evidence contradicted the prosecution's timing of events and showed the crime was a spontaneous moment of gang rivalry rather than a planned conspiracy.

However, as to Rudy Gonzalez, even assuming for the sake of argument that his statement to Peoples was against Gonzalez's penal interest, it was unreliable hearsay because Gonzalez was

not even there. He stayed home. He refused to name the persons who apparently told him they went out and shot someone. Without showing who made those statements, it could not be shown that those persons were unavailable, and therefore those statements were not admissible as declarations against those persons' interest. Defendants' citation to *People v. Provencio* (1989) 210 Cal.App.3d 290, is unavailing. *Provencio* admitted an anonymous declarant's statement not as a statement against penal interest, but as a spontaneous statement (Evid. Code, § 1240).

As to Estrada, we agree with the People that the only portion of Estrada's statement that was against his penal interest was that he disposed of the gun. Defendants think this would conflict with evidence that Cervantes said he got rid of the gun by tossing it in the river, because it takes only one person to throw a gun away. However, it is possible for more than one person to be present when a gun is thrown away and for more than one person to claim credit for the toss.

Cervantes argues the jury would have been receptive to evidence of third party culpability, because the jury twice asked why they had not heard from or about what happened to Guillermo Ramirez. However, this does not render the trial court's ruling erroneous or prejudicial.

Under the subheading regarding exclusion of evidence of third party culpability, Cervantes complains the trial court refused a defense request for a jury instruction on third party

culpability. However, the trial court did instruct, "The defendants in this case have introduced testimony for the purpose of showing that another person or persons may have committed or been involved in a separate or different conspiracy, to commit the crimes for which these defendants are here on trial. If, after consideration of all the evidence, you have a reasonable doubt that any or all of these defendants committed any of the crimes charged, you must find that defendant or those defendants not guilty."

We conclude defendants fail to show any evidentiary error warranting reversal.

VII. Substantial Evidence

Arellano argues no substantial evidence supports (1) the convictions regarding the three victims other than Stepper under the natural and probable consequences doctrine; (2) findings of premeditated and intentional gang murder of Eric Folsom; and (3) a finding the shootings were gang-related. Cervantes joins and adds there was no evidence he was a gang member. Olague joins and adds a claim that, because there was insufficient evidence of his involvement, the trial court erred in denying his motion for acquittal (§ 1118.1) at the close of the prosecution's case in chief.

We review substantial evidence claims under the familiar standard of review of the whole record to determine whether any rational trier of fact could have found the elements of the

crime beyond a reasonable doubt. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) The same standard governs our review of the acquittal motion. (*People v. Valerio* (1970) 13 Cal.App.3d 912, 919.) For purposes of this appeal, we will accept Olague's argument against adoption of a federal rule about waiver of acquittal where a defendant presents evidence. We shall conclude substantial evidence supports the judgments.

A. Natural and Probable Consequences

Murder convictions may be sustained on the theory that murder was a natural and probable consequence of a planned assault with a deadly weapon. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262-263.) Arellano argues this was, at most, a targeted walk-up shooting to discipline one person in the gang, Stepper, and the shooter's unexplained, indiscriminate shooting of nonresisting associates was "beyond the pale" and should not be attributed to accomplices. However, there was evidence this was not simply to discipline one person. There was evidence that Arellano was angry that so many of his fellow gang members owed him money for drugs and were consuming the drugs instead of selling them. He wanted to send a message and instill fear in the community. When Lopez asked why they needed him to be a getaway driver if all they were going to do was "smash on him [Stepper]," Arellano said it was going to be a little bit more than that. Arellano told Easlon and Betancourt to leave the

pre-Halloween gathering because Olague was bringing the gun over for Cervantes to check out.

Substantial evidence supports murder and attempted murder as a natural and probable consequence.

B. Premeditation/Intent

Arellano argues he could not be convicted of first degree murder of Eric Folsom under a natural and probable consequences theory, unless premeditation was a natural and probable consequence of the alleged plan. Arellano says the prosecutor did not even allege premeditation with respect to the shooting of Eric Folsom. However, Arellano cites no authority supporting his position. The indictment did allege first degree premeditated murder of Eric Folsom, and the prosecutor argued to the jury that defendants murdered Folsom because he was in the wrong place at the wrong time, and defendants knew they could not afford to leave any witnesses behind.

Arellano says the court commented it believed the jury would err if it found anything more than second degree murder as to Folsom (as the other jury found in Christina Marten's trial). However, that comment, made during discussion of jury instructions, was made before the prosecutor explained the theory he planned to argue to the jury (which the court conceded was arguable), that when Cervantes approached the truck and saw Stepper was not alone but was talking and laughing with other people, Cervantes had time to decide whether to proceed or abort

the plan; he had time to calculate, deliberate, and decide to kill all of them; he proceeded to shoot Stepper and then proceeded to aim at and shoot the others; and his coconspirators were bound by his acts. The prosecution presented this theory to the jurors in closing arguments, as well as the argument that gang members are schooled "the more violent you are, the better . . . ."

Substantial evidence supports the prosecutor's theory. There was evidence about violence as a component of gang culture, as well as the plan in this case to do something major to instill fear in the community. Cervantes had time to see Stepper was not alone before proceeding with the plan, yet Cervantes chose to proceed. After shooting Stepper, Cervantes aimed at and fired gunshots at the other three, and there was evidence of this from the surviving victims.

Arellano cites (without discussion) *People v. Francisco* (1994) 22 Cal.App.4th 1180 at pages 1188-1191. However, *Francisco* rejected a defendant's claim that the aiding/abetting instruction misled the jury into believing that an intent to kill was not necessary for first degree murder. (*Id.* at p. 1189.) *Francisco* said it "is well settled that a defendant whose liability is predicated on his status as an aider and abettor is not required to have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. It is the intent to encourage and bring about the

criminal conduct of the planned offense which the jury must find, not the specific intent that is an element of the target offense." (*Ibid.*)

Arellano also cites (without discussion) *People v. Caesar* (2007) 153 Cal.App.4th 114, which was depublished after Arellano filed his opening brief and later replaced by *People v. Caesar* (2008) 167 Cal.App.4th 1050. *Caesar* is distinguishable, because the problem there was that the jury found the nonshooter guilty of premeditated attempted murder despite finding the shooter guilty of *unpremeditated* attempted murder.

Arellano argues the finding of intentional gang killing as a *special circumstance* (§ 190.2, subds. (a)(22) & (c)[12]) as to Folsom makes even less sense, because that finding requires that the actual killer and the accomplice both specifically intend Folsom's death; natural and probable consequence is not enough.

---

[12] Section 190.2 states in part: "(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole [LWOP] if one or more of the following special circumstances has been found [true] . . . [¶] (22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang . . . and the murder was carried out to further the activities of the criminal street gang. [¶] . . . [¶] (c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for [LWOP] if one or more of the special circumstances in subdivision (a) has been found to be true . . . ."

Arellano says the fact the jury made this finding despite the prosecutor's concession of no evidence Arellano intended to kill anyone but Stepper, speaks to the prejudicial effect of other errors assigned on appeal. He cites the jury instruction that this special circumstance required findings that "1. A defendant intentionally killed the victim or, with the intent to kill, aided and abetted in the killing; [¶] 2. At the time of the killing, that defendant was an active participant in a criminal street gang; [¶] 3. The members of that gang engaged in . . . a pattern of criminal gang activity; [¶] 4. That defendant knew that the gang members engaged in or have engaged in a pattern of criminal gang activity; and [¶] 5. The murder was carried out to further the activities of the criminal street gang."

However, there was evidence, and the prosecutor did argue, that the murder of any witnesses was part of the plan. The plan was to make a big statement to instill fear in the community. They planned the event for Halloween, when people are out at night. Cervantes saw witnesses were with Stepper, yet continued with the plan and approached and shot Stepper. Cervantes then pointed and shot at Eric Folsom at close range. The act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice. (*People v. Smith* (2005) 37 Cal.4th 733, 741-742.) Cervantes was not a

shot caller or even a gang member, which supports the inference he was following the plan.

We conclude substantial evidence supports the conviction for first degree murder of Eric Folsom as to all three defendants.

C. Section 186.22

Arellano argues there is no substantial evidence of gang-related offenses under section 186.22, because there is no substantial evidence the offenses were committed on behalf of a Norteño *street* gang subset, as opposed to a prison gang or a general regional affiliation. However, as Arellano acknowledges, we have held to the contrary, that a subset need not be identified. (*People v. Ortega* (2006) 145 Cal.App.4th 1344.)

Arellano also argues this case involves a diverse group assisting an attack to aid a personal or joint drug dealing, not dealing for any particular gang. However, the evidence here meets the standard for section 186.22, that the crime was committed for the benefit of, at the direction of, or in association with any criminal street gang, and with specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.)

Cervantes argues there was no evidence he was a gang member. However, a person need not be a gang member to be

guilty of violating section 186.22. (*In re Jose P.* (2003) 106 Cal.App.4th 458, 466.) Here, there was plenty of evidence that Cervantes associated with gang members, understood gang culture, was present when Arellano and Olague discussed the plan, and that a non-gang-member would be trusted as shooter in a gang-related crime with an eye toward earning membership in the gang. Cervantes complains the expert gave as an (invalid) example of association the fact that Cervantes once lived with Olague's family. However, that example did not stand alone.

The evidence sufficed for application of section 186.22

D. Olague

Olague argues there was insufficient evidence that he knew Cervantes planned to kill Stepper and shoot the others. He argues his Sureño membership had minimal relevance, because this was not the typical gang versus rival gang case, but involved drugs and debts. Olague did not have a motive like the other participants who did it in exchange for drugs (Cervantes) or pay off a drug debt (Easlon). Olague argues the only evidence implicating him, other than uncorroborated accomplice testimony, was insignificant evidence that he was there. Olague acknowledges that slight or circumstantial corroboration will suffice if it connects the defendant to the offense (*People v. Abilez* (2007) 41 Cal.4th 472, 505), but he cites authority that presence at the scene is not enough.

Here, however, there was more than mere presence at the scene. Olague admitted he ran from the police because he thought he matched the description of a perpetrator, and on appeal Olague admits there was evidence that he threatened jailhouse informant Bowie. Olague claims the trial court disregarded the evidence that he ran from the scene, because when the prosecutor raised the point, the court said, "If you were innocent and heard that description you might run too though." However, the prosecutor challenged that conclusion, and the court said, "Okay." Olague argues that threatening Bowie holds little corroborative weight, because he may have been sticking up for his fellow gang members, and jailhouse snitches are frequently subject to danger from gangs for cooperating with police, whether or not the individuals making the threat are involved in the actual crime. However, threatening Bowie plus running from the police together provide the requisite slight corroboration connecting Olague to these offenses.

We need not discuss the parties' dispute whether other evidence sufficed as corroboration, or whether the uncharged conspiracy lightened the corroboration requirement.

We conclude the trial court properly denied the acquittal motion, and substantial evidence supports the judgments.

VIII. Jury Instructions

The trial court and counsel agreed to use CALJIC rather than California Judicial Council Criminal Jury Instructions (CALCRIM).

For the most part, we address defendants' contentions despite questions of forfeiture. (§ 1259.)

In reviewing challenges to jury instructions as incorrect or incomplete, we do not view jury instructions in isolation but consider them in the context of the overall charge to the jury. (*People v. Rundle* (2008) 43 Cal.4th 76, 149.) The test for ambiguity in instructions is whether there is a reasonable likelihood the jury misunderstood and misapplied the instruction. (*Ibid.*)

A. CALJIC No. 2.50

Arellano contends the trial court erred in giving, unedited, CALJIC No. 2.50[13] (other crimes evidence), that

---

[13] CALJIC No. 2.50 said in part, "Evidence has been introduced for the purpose of showing that a defendant committed crimes other than that for which he is on trial, and in addition, evidence has been introduced for the purpose of showing criminal street gang activities, and of criminal acts by gang members, other than the crimes for which the defendants are on trial. [¶] Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show: [¶] A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend

permitted the jurors to consider other crimes and all gang evidence on all conceivable issues in the case. We see no basis for reversal.

Defense counsel initially asked the trial court to delete references applicable to prior *similar* crimes (intent, identity, motive, etc.), because there were no prior *similar* crimes in this case. The issue was deferred. Arellano says CALJIC No. 2.50 apparently was used to cover gang enhancement predicates, and perhaps gang membership on issues like motive. He complains the instruction permitted the jurors to consider all gang evidence and all other crimes evidence on every conceivable issue in the case.

However, as Arellano acknowledges, the prosecutor did not explicitly argue prior similar acts. Moreover, the instruction on its face limited the jury's consideration of the other crimes evidence. Additionally, the trial court gave a limiting

---

to show the existence of the intent which is a necessary element of the crime charged or the identity of the person who committed the crime, if any, of which a defendant is accused or a clear connection between the other offense and the one of which the defendant is accused so that it may be inferred that if a defendant committed the other offenses, that defendant also committed the crimes charged in this case; [¶] [Intent, identity, motive, knowledge, conspiracy.] [¶] That the . . . crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as [other evidence]. [¶] You are not permitted to consider such evidence for any other purpose."

instruction, pursuant to CALJIC No. 17.24.3, that evidence of gang activities, other than the charged offenses, "may be considered by you only for the limited purpose of determining if it tends to show that the crime or crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent [etc]. For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose."

Arellano argues CALJIC No. 17.24.3 "apparent[ly]" conflicted with CALJIC No. 2.50, because the latter allowed the jurors to consider gang evidence and other crimes evidence on every conceivable issue in the case. However, CALJIC No. 2.50, footnote 13, *ante*, specified, "Except as you will otherwise be instructed . . . ."

Arellano also argues the trial court failed to instruct with CALJIC No. 2.50.2, the definition of preponderance of evidence. The People respond the trial court did give that instruction (immediately after an instruction concerning admissibility of coconspirators' statements). Arellano replies nothing told the jurors this standard applied to CALJIC No. 2.50. However, Arellano fails to show how he was prejudiced. CALJIC No. 2.50 told the jurors how to use evidence of other crimes, "if believed." Preponderance is the easiest standard to

meet. Thus, any omission was harmless (individually and considered cumulatively with other errors).

We see no basis for reversal regarding CALJIC No. 2.50.

B. Instruction - Accomplices

Arellano and Olague raise several complaints about the jury instructions on aiding/abetting versus conspiracy and natural/probable consequences. We see no grounds for reversal.

First, Arellano argues the court failed to instruct the jurors that, under the natural and probable consequences doctrine, an aider/abettor may be convicted of a lesser offense than the perpetrator. We have said, "an aider and abettor may be found guilty of crimes committed by the perpetrator which are less serious than the gravest offense the perpetrator commits, i.e., the aider and abettor and the perpetrator may have differing degrees of guilt based on the same conduct depending on which of the perpetrator's criminal acts were reasonably foreseeable under the circumstances and which were not." (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1586-1587, italics omitted [aider/abettor may be found guilty of second degree murder under natural/probable consequence doctrine although the principal was convicted of first degree murder].) However, this point was adequately conveyed to the jury in a special instruction which stated: "If you determine . . . a defendant aided and abetted a target crime and that the killing was a natural and probable consequence of the offense, you must then

further determine whether the killing was murder and if so, what degree? To find that the murder is first degree, you must [determine]: [¶] 1. The actual killer committed first degree murder [as defined in other instructions], and [¶] 2. The circumstances which make the murder first degree as to the actual killer were a natural and probable consequence of the commission of the target crime rather than the independent product of the mind of the actual killer. [¶] If you have a reasonable doubt whether the offense committed was first degree or second degree murder, you must give that defendant [i.e., the aider/abettor] the benefit of the doubt and find him guilty of second degree murder."

Second, Arellano argues the court failed to instruct the jury how to make the *degree* determination for murder for purposes of foreseeability under the natural/probable consequences doctrine -- specifically in failing to instruct the jurors they must determine whether the circumstances *or* mental state (which made the perpetrator's action first degree murder) were foreseeable consequences from the standpoint of Arellano's accomplice liability. This argument is defeated by the language of the instruction quoted in our preceding paragraph.

Third, Arellano complains of the court's refusal to give a jury instruction submitted by the defense to instruct the jurors that the objective foreseeability determination is to be based on a reasonable person *in defendant's position* and may only

consider facts *known* to defendant. To the extent Arellano suggests the jury must make findings as to his actual knowledge, his cited authority does not go that far, i.e., CALCRIM (2006) No. 402 does not require findings of actual knowledge; it says, "Under all of the circumstances, a reasonable person in the defendant's position would have known that the [non-target offense] was a natural and probable consequence . . . ." A defendant's liability is not limited by his own knowledge but, rather, extends to the natural and probable consequences of any criminal act he knowingly aided. (*People v. Flores* (1992) 7 Cal.App.4th 1350, 1361.)

Moreover, Arellano does not demonstrate any possible prejudice; he does not point to any evidence of any circumstance of which he was unaware. The court instructed the jury, "In determining whether a consequence is 'natural and probable,' you must apply an objective test, based not on what a defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen." Although the instruction as given did not use CALCRIM's words "in the defendant's position," Arellano fails to show any possible prejudice. The instruction referred

to all surrounding circumstances, and the surrounding circumstances argued by the prosecutor in closing arguments included all the circumstances, including gang culture. He told the jury that, in determining natural and probable consequences, "you must immerse yourself into the world of gangs and think what is that natural and probable consequence in the world of gangs. Not for you and me. For gangs."

Fourth, Arellano argues the court gave one oblique instruction on the independent product rule for aiders/abettors (that an aider/abettor was not guilty of first degree murder if the premeditation was an independent product of the shooter's mind), yet incongruously refused any instruction (like CALJIC No. 6.15) on the independent product rule under the conspiracy instructions. Assuming the defense proposed such an instruction, and further assuming it should have been given, we see no possible prejudice. The "independent product" phrase in the aiding/abetting instruction merely said that, to convict the aider/abettor of first degree murder, the jury must find (1) the actual killer committed first degree murder, and (2) first degree murder was a natural and probable consequence of the target crime, rather than the independent product of the killer's mind. The conspiracy instructions gave the qualification about natural/probable consequences. The omission of the words "rather than the independent product" is inconsequential.

Fifth, Arellano maintains CALJIC No. 6.16 misstated conspirator liability by indicating a conspirator is liable for a fellow conspirator's acts that do not further the common plan, as long as they are natural/probable consequences of the common plan. The court instructed the jury pursuant to CALJIC 6.16: "Where a conspirator commits an act or makes a declaration which is neither in furtherance of the object of the conspiracy nor the natural and probable consequence of an attempt to attain that object, he alone is responsible for and is bound by that act or declaration, and no criminal responsibility therefor attaches to any of his confederates." The court also instructed the jury, "You must determine whether a defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes, and, if so, whether the crime alleged was perpetrated by co-conspirators in furtherance of that conspiracy *and* was a natural and probable consequence of the agreed upon criminal objective of that conspiracy." (CALJIC No. 6.11; italics added.) The instructions correctly stated the law. (*People v. Prieto* (2003) 30 Cal.4th 226, 249-250; *People v. Hardy* (1992) 2 Cal.4th 86, 188; CALCRIM No. 417.) Even assuming any confusion in the instructions, Arellano fails to show any possible prejudice. Under the prosecution's theory, one purpose of the conspiracy was to elevate the community's fear of gangs. The natural/probable consequence of the shooter shooting

eyewitnesses in addition to the main target furthered this object of the conspiracy.

Sixth, Arellano says CALJIC No. 6.11 confusingly referred to the natural/probable consequences of "any crimes" committed by a conspirator, not the natural/probable consequences of the original object of the conspiracy. Arellano says CALCRIM 417 corrects this flaw. However, Arellano distorts the instruction, which told the jury: "A member of a conspiracy is not only guilty of the particular crime that to his or her knowledge his confederates agreed to and did commit, but is also liable for the natural and probable consequences of any crimes of a co-conspirator to further the object of the conspiracy, even though that crime was not intended as a part of the agreed upon objective and even though he or she was not present at the time of the commission of that crime. [¶] You must determine whether a defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes, and, if so, whether the crime alleged was perpetrated by co-conspirators in furtherance of that conspiracy and was a natural and probable consequence of the agreed upon criminal objective of that conspiracy." In context, the "any crimes" language refers to a crime that was committed in furtherance of the conspiracy. Thus, any such crimes were part of the original object of furthering the conspiracy.

Seventh, Arellano complains the court failed to instruct on voluntary and involuntary manslaughter as lesser offenses for both homicide victims, especially Folsom. However, even assuming error for the sake of argument, it was harmless (individually and cumulatively). In similar circumstances, *People v. Prettyman, supra*, 14 Cal.4th 248, said that, where the trial court instructed on second degree murder as a lesser included offense of first degree murder, and the jury convicted the defendant of first degree murder rather than second degree murder, the jury necessarily rejected the possibility that the only natural and probable consequence of the crime she aided/abetted was involuntary manslaughter, and the defendant suffered no prejudice from any possible error in failing to instruct on involuntary manslaughter. (*Id.* at p. 276.) The factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. (*Ibid.*) Here, the jury rejected second degree murder and found first degree murder and therefore defendants suffered no prejudice.

Under a separate subheading, Arellano argues the differences between the aiding/abetting and conspiracy instructions were incongruous and confusing. As is apparent from our discussion, we disagree.

On the same subject of accomplice instructions, Olague argues the trial court erred in instructing the jury on

natural/probable consequences and in defining, as target offenses, simple assault and assault with force likely to produce great bodily injury. He argues that, in the gang context, the doctrine of natural and probable consequences usually applies to a situation in which escalating violence between rivals turns a less violent crime into a more violent crime -- which did not happen in this case, where the shooter simply walked up and fired the gun with no resistance from the victims. However, that one context is the "usual application" does not preclude use of the principle in another context. To the extent Olague argues murder was not a natural and probable consequence of a planned assault, clearly the evidence sufficed to instruct the jury on the issue.

Olague cites *People v. Cox* (2000) 23 Cal.4th 665, for the supposed proposition that a defendant may be convicted of murder based on a target offense of simple assault only when that conduct was "inherently dangerous under the circumstances of its commission." However, *Cox* was not an aiding/abetting case. Rather, it dealt with the question whether conviction of involuntary manslaughter based on an unlawful act, not amounting to felony, requires a showing that the predicate misdemeanor was dangerous under the circumstances of its commission. (*Id.* at p. 667.) In any event, although simple assault was included in the jury instructions in this case, no one argued this was a simple assault, and the evidence showed at a minimum a planned assault

with a gun, thus an assault with force likely to produce great bodily injury. Thus, this is not a case, as argued by Olague, where instruction on a legally incorrect theory requires reversal due to the inability to determine whether the jury based its verdict on a proper theory or the legally incorrect theory. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) The jury was fully equipped to detect that there was no evidence that the planned crime was merely a simple assault.

We see no basis for reversal in the jury instructions on aiding/abetting and conspiracy.

C. Instruction - Unanimity

Arellano argues the trial court erred in refusing and failing to instruct the jurors that they had to agree unanimously on the offense intended (assault versus murder) for purposes of aiding/abetting or conspiracy liability. He argues the failure to require unanimity violated his constitutional right to a unanimous verdict. We disagree.

The court instructed the jurors the target crimes were assault, assault by means of force likely to produce great bodily injury, and/or murder, and they did not need to agree unanimously as to which originally contemplated crime a defendant aided/abetted, so long as they unanimously agreed the defendant aided/abetted the commission of an identified and defined crime and that the crime of murder and/or attempted murder was a natural and probable consequence of the commission

of that target crime. The court instructed the jurors they need not unanimously agree as to which originally contemplated crime a defendant conspired to commit, so long as they unanimously agreed the defendant conspired to commit assault, assault by means of force likely to produce great bodily injury, and/or murder.

Arellano acknowledges that *People v. Prettyman, supra*, 14 Cal.4th 248, indicated (though he characterizes it as dictum) that unanimity is not required for target offenses under an aiding/abetting theory. (*Id.* at pp. 267-268.) He nevertheless argues a unanimity instruction was needed here, especially under the conspiracy theory, because the evidence suggested more than one discrete conspiracy. (*People v. Russo* (2001) 25 Cal.4th 1124, 1135; CALCRIM No. 416 (2006-2007), Bench Notes, p. 205.)

Russo, supra, 25 Cal.4th 1124, held the jury did not need to agree on a specific overt act as long as it unanimously found that some conspirator committed an overt act. (*Id.* at p. 1128.) *Russo* said, "The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more

discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Id.* at pp. 1134 - 1135.)

Arellano argues that, "Perhaps conspiracies to commit an armed gang assault versus a murder are not truly distinct in some cases. Here the conspiracies to assault versus kill were indeed distinct in any fair sense of the word." However, Arellano's argument is based on a selective reading of the evidence. He says no one directly reported an order to kill or even use a gun on Stepper (only a request to beat him up), and more than one conspirator was surprised a shooting occurred. However, there was no evidence that any of these defendants, as conspirators, were surprised. Contrary to Arellano's view that gun references were "oblique," there was testimony that, at the gathering to plan the crimes, Arellano told Easlon and Betancourt (who had refused to participate as perpetrators) to leave because Olague was bringing over the gun for Cervantes (who had agreed to do the deed) to check out.

The trial court was not required to give unanimity instructions.

D. CALJIC No. 3.16

Arellano contends the trial court erred by instructing the jury, "If the crime of Murder and/or Attempted Murder were committed by anyone, Nate Easlon, Richard Betancourt, Gilberto Lopez, and Christina Marten were accomplices as a matter of law and their testimony and/or statements are subject to the rule requiring corroboration." We disagree.

Arellano argues the instruction improperly directed a verdict or reduced the prosecution's burden, because the instruction all but told the jurors that the confessing codefendants were accomplices to a conspiracy, making defendant's guilt a foregone conclusion. We disagree. The instruction was a correct statement of law.

Arellano argues that, even if error was invited (by the defense's participation in drafting the instruction), the instruction suffers a distinct defect not raised in the trial court, i.e., it undermined the defense theory of third party culpability. Arellano argues the instruction needed to clarify that the named persons were accomplices only if the prosecution's theory was true. However, the failure to request modification forfeits the argument. (*People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130.) Cervantes says he did not assent to the instruction. However, that is not enough; he had to make

an affirmative request for modification in order to preserve the issue.

E. CALJIC No. 2.21.2

Arellano complains the trial court instructed pursuant to CALJIC No. 2.21.2, "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the *probability* of truth favors his or her testimony in other particulars." (Italics added.) Arellano argues the instruction permitted jurors to resolve dispositive credibility questions as to impeached prosecution witnesses by a preponderance standard. However, Arellano recognizes we are bound by the California Supreme Court's approval of the instruction (e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 714) and states he submits the matter to preserve it for federal review.

F. Modified CALJIC No. 3.13

Olague complains the trial court improperly modified CALJIC No. 3.13, at the prosecutor's request, after defendants presented their closing arguments to the jury. We see no basis for reversal.

Under CALJIC No. 3.13, "The required corroboration of the testimony of an accomplice may not be supplied by the testimony

of any or all of his accomplices, but must come from other evidence."

The court added, at the prosecutor's request, "However, a defendant's testimony and/or statements and any reasonable inferences therefrom may be sufficient, if believed, to corroborate the testimony of an accomplice." The court added, at the suggestion of defense counsel, "Whether the corroboration evidence is as compatible with innocence as it is with guilt, is a matter of weight, for the trier of fact."

The trial court offered to allow defendants to reopen their arguments to the jury for 15 minutes that day (no continuance), to address the modification, but Olague and Arellano declined.

Despite the fact that the modification was a correct statement of law (*People v. Ruscoe* (1976) 54 Cal.App.3d 1005, 1012), Olague complains the jury might have misinterpreted it as permitting one codefendant's statements to act as corroboration not only as to himself, but also as to the other defendants. However, such a contention is forfeited where, as here, the defendant did not request further clarification of the instruction in the trial court. (*People v. Fiu* (2008) 165 Cal.App.4th 360, 370.) Olague argues (1) any objection would have been futile because the trial court already decided the modification was proper, and (2) we have discretion to address the matter despite forfeiture. That the trial court decided the modification was proper does not mean the court would have

refused further clarification. We decline to consider the matter further.

G. Refusal of Defense Pinpoint Instruction

Olague maintains the trial court erred in denying his requested pinpoint instruction that the act, knowledge and intent required for aiding/abetting must be formed before or during the alleged crime. We disagree.

Olague says instruction on timing was necessary, because there was evidence that (1) he was at the scene of the crime after the shooting; (2) he told others to remain silent; and (3) he threatened the jailhouse snitch.

However, the court refused the instruction because it was redundant and already covered in other instructions, which said there must exist a union of act and intent, and a person aids/abets when he, with knowledge of the unlawful purpose and with intent to facilitate the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime. We are unpersuaded by Olague's complaint that the instruction did not mention timing.

There was no error in denial of the pinpoint instruction.

H. Instruction Re Asserted *Doyle* Misconduct

Arellano argues the trial court erred in refusing to instruct the jurors about the prosecutor's misconduct in cross-examining Arellano about his trial testimony denying pre-Halloween acquaintance with Betancourt. Arellano says the

prosecutor questioned him about his failure to deny the acquaintance during the three years after his last interview with the police, at which time Arellano had invoked his right to remain silent. Arellano also claims the court erred in denying his related motion for new trial based on this point. We see no basis for reversal.

Prosecutorial comment on a defendant's silence is prohibited by *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91], because it infringes on the defendant's right to remain silent. *Doyle* error is reviewed for prejudice under a *Chapman* standard. (*People v. Earp* (1999) 20 Cal.4th 826, 857-858.)

Here, Arellano did speak with police in November and December 2002, but he later invoked his right to remain silent when they tried to re-interview him.[14]

In his trial testimony, Arellano said he met Richard Betancourt for the first time in late 2002, *after* Halloween. On cross-examination, the prosecutor asked Arellano to acknowledge he never mentioned this fact before. He said he did not remember. The prosecutor asked Arellano to acknowledge he never mentioned it when he spoke with the police in 2002 or 2003. Arellano dodged the questions and said he did not remember. The prosecutor mentioned the jury had tapes of the police interviews and asked, "Have you ever said this before today? . . . I'm

---

[14] The jury saw a videotape of a November 4, 2002, police interview with Arellano.

talking about law enforcement or this Court." Arellano said, "I don't think I was never [*sic*] asked that question."

The prosecutor also cross-examined about Arellano making reference for the first time at trial to a Mr. Zarete as having introduced Arellano to Betancourt in late 2002. The prosecutor asked if Arellano had ever "before today" mentioned this to anybody in law enforcement or in court. Arellano did not remember.

The prosecutor then asked Arellano whether he was in custody since 2003 and knew Betancourt would be a prosecution witness. Defendants objected on the grounds Arellano was represented by counsel, and the defense was not required to prove anything. The court instructed the jury the defense had no obligation to present any evidence, and the prosecution had the burden, and the jury was to disregard any questions by the prosecutor suggesting or asking where a witness was or if someone was going to testify for the defense.

The prosecutor then asked Arellano again about statements he was making for the first time at trial that he did not make in police interviews.

Although defendants did not object at the time of this testimony, they raised *Doyle* during a recess. The trial court initially indicated it would be willing to give a jury instruction if the parties fashioned an appropriate one, but the defense's proposed instruction went too far, because Arellano

did give interviews to the police, and "it is fair game for the People to say when you talked to the police, you never said anything about that, that's fair game." Arellano's counsel agreed.

The trial court ultimately concluded there was no *Doyle* problem (hence no need for instruction), because Arellano waived his right to remain silent and gave two interviews to the police, and it was fair for the prosecutor to bring out that Arellano did not say in his police interviews things he was saying on the witness stand. Also, the prosecutor agreed not to argue to the jury Arellano's silence after he invoked his right to remain silent.

Assuming error, it was harmless beyond a reasonable doubt. Arellano did speak with the police on two or three occasions, and his attorney admitted it was appropriate for the prosecutor to probe omissions from those statements. The prosecutor did not ask the jury to use Arellano's silence after he invoked his right to remain silent.

I. Instruction Re Cervantes's Escape Attempt

Cervantes complains the trial court instructed the jury on "attempted escape" as bearing on consciousness of guilt, without substantial evidence that he tampered with the handcuffs. Our rejection of Cervantes's evidentiary contention, *ante*, defeats this claim of instructional error.

We conclude there was no instructional error warranting reversal of the judgments.

IX. Claims of Governmental Misconduct

Olague contends the prosecutors (and/or their agents) engaged in misconduct by addressing the grand jury without a court reporter, filing criminal charges against two defense attorneys for failing to redact witness identifications from police reports shared with defendants, threatening defense witnesses, disrupting the crime scene before the jurors viewed it, and contacting a defense expert without identifying themselves as prosecutors.[15] Based on these claims of misconduct, Olague complains the trial court erred in denying a defense motion to recuse the Yolo County District Attorney and motions for mistrial or dismissal. Olague also claims the cumulative effect of prosecutorial misconduct deprived him of constitutional rights.

The question is whether prosecutorial misconduct so infected the trial with unfairness as to make the resulting conviction of Olague a denial of due process. (*People v. Earp, supra*, 20 Cal.4th at p. 858.) Conduct of a prosecutor that does not render a criminal trial fundamentally unfair is

---

[15] As indicated *ante*, defendants also complain the prosecutor committed misconduct by mentioning Christina Marten in his opening statement, after agreeing not to do so. However, the prosecutor agreed not to mention "what she would say," and he kept that promise.

prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade the jury. (*Ibid.*)

We shall conclude defendants fail to show grounds for reversal.

A. Grand Jury

We have already rejected the contention regarding the prosecutor's comments to the grand jury before the court reporter's equipment was set up.

B. Charges Against Defense Attorneys

After the search of defendants' jail cells, the prosecution brought criminal charges against the attorneys for Olague and Betancourt for failing to redact identifying witness information from police reports shared with their clients. (§ 1054.2 [attorney may not permit to be disclosed to a defendant the address or telephone number of a victim or witness whose name is disclosed to the attorney in discovery].)

Although defendants were advised of the conflict and waived it, Olague and Betancourt moved to recuse the Yolo County District Attorney's office for conflict and misconduct. County counsel, representing the District Attorney's office, opposed the motion, noting defendants had waived the conflict, and an ethical wall would keep separate the prosecutions against attorneys and clients. The trial court denied the motion.

Under section 1424, a recusal motion will not be granted unless the moving party shows a conflict of interest exists and is such as to render a fair trial unlikely. (*People v. Eubanks* (1996) 14 Cal.4th 580, 592; *People v. Conner* (1983) 34 Cal.3d 141, 147.) We review the trial court's decision under an abuse of discretion standard. (*People v. Zapien* (1993) 4 Cal.4th 929, 968.)

Here, any conflict was waived by defendants, and therefore recusal was not necessary.

On appeal, Olague argues, without supporting legal authority, that we should disregard the waiver because it did not make the conflict "magically disappear." Olague relies on his perception of a continuing course of misconduct by the prosecutors (the prosecutor's unreported comment to the grand jury, the jail search which Olague characterizes as illegal) to demonstrate he could not get a fair trial. However, we have rejected his claims on these other points. Moreover, Olague's reply brief acknowledges new California Supreme Court authority that a defendant seeking recusal must identify an actual conflict and prosecutorial misconduct may not suffice. (*People v. Superior Court (Humberto*) (2008) 43 Cal.4th 737; *Hollywood v. Superior Court* (2008) 43 Cal.4th 721.)

We reject Olague's view that this is a matter of structural error requiring per se reversal. Olague claims a Massachusetts case found a due process basis for recusal where the prosecutors

in an insurance fraud prosecution had a personal interest because their salaries were indirectly paid by the insurance companies. However, even apart from the fact that a Massachusetts case is not binding on us, here the prosecutors had no personal interest in either prosecution.

Olague urges reversal even under an abuse of discretion standard, because he thinks it was clear by the time of the recusal motion that the prosecution was set on obtaining a conviction by any means. We disagree.

It was not misconduct for the District Attorney's office to file criminal charges against the attorneys, and the trial court did not abuse its discretion in denying the recusal motion or in denying mistrial/dismissal motions based on this matter.

C. Claim of Threats to Defense Witnesses

Olague contends the government engaged in misconduct by threatening defense witnesses in the hallway before they testified. Though we find some of the conduct troubling, we shall conclude it does not warrant reversal of the judgment.

When Betancourt was a defendant, he apparently denied being at a *pre*-Halloween meeting at Arellano's apartment and said his family members in Greenfield would verify he was with them every day before Halloween 2002. After making his plea bargain, Betancourt testified as a prosecution witness that he lived with family members in Greenfield before Halloween, but he came to

Woodland two or three times, and he was present at the pre-Halloween meeting at Arellano's home.

In an attempt to refute Betancourt's testimony about a pre-Halloween meeting, the defense contended the gathering happened *after* Halloween. Betancourt's cousin, aunt, and grandmother, testified he and they lived in Greenfield in October 2002, he ate dinner with them every day, he had a work injury, and it takes three hours to drive to Woodland.

The aunt and grandmother also testified that, while they were in the hallway outside the courtroom, waiting to testify, the prosecutor (Reisig) approached them with two men (whom the prosecutor said would be witnesses to the conversation), asked them if it was possible Betancourt was in Woodland before Halloween, told them Betancourt testified he was in Woodland before Halloween, and told them he would be in trouble if his testimony was a lie. The prosecutor acknowledged this in his questions on cross-examination.

Jennifer Betancourt (Richard's cousin) testified as a defense witness. She lived in Woodland. Richard came to visit on Halloween and not before Halloween. They were very close, and he would have called her if he had come to Woodland. She met Arellano for the first time when she attended a gathering at his home with Betancourt a couple of weeks after Halloween. Jennifer testified that, as she stood in the hallway waiting to testify, the prosecutor approached her and said that, if she

testified as expected, she would look stupid because everyone else was saying something different. Also, a police detective approached her in the hall and said if she was lying, he would find out and arrest her, and she would be putting Richard's plea deal at risk. He said he knew her whole family was lying. Jennifer admitted on cross-examination that she initially told the police (a year earlier) that she could not remember if she attended the gathering at Arellano's home before or after Halloween. She testified she was nervous when she spoke to the detective. She also admitted she did not like victim Jessica Valdez, because Jessica was having sex with Jennifer's boyfriend.

The defense moved for a mistrial on the ground the government tried to intimidate witnesses. The court disapproved of the government's conduct but denied the motion because the witnesses' testimony helped the defense.

As indicated, a trial court should grant a mistrial only when the defendant's chances of receiving a fair trial have been irreparably damaged; the standard of review is abuse of discretion. (*People v. Williams, supra*, 40 Cal.4th at p. 323.)

Clearly, it was misconduct for the prosecutor to tell witnesses how another witness testified, since the trial court had granted a motion to exclude witnesses from the courtroom until their testimony (though the family presumably could have learned from Richard how he planned to testify). Olague cites

section 136.1, which criminalizes attempts to prevent or dissuade any witness from testifying. The prosecution made no such attempt. However, even though the prosecutor did not directly ask the witnesses to change their story, he impliedly attempted to coerce them by telling them they would be jeopardizing Richard's plea deal.

Nevertheless, we cannot say the trial court abused its discretion. The misconduct was not prejudicial, because the defense witnesses were not swayed to change their story. Jennifer even testified she is not afraid of the prosecution or their officers and, although she loves Richard, she does not care if she "mess[es] up" his plea deal, she just came to tell the truth. Moreover, the testimony was not critical. Just because family members saw Richard in Greenfield every day or did not see him in Woodland (assuming they have perfect recall) does not mean he could not have gone to Woodland. Thus, the prosecutor's misconduct did not prejudice defendants.

Olague argues Jennifer "backed away" from her earlier testimony that had been favorable to the defense. However, the cited pages of trial transcript merely show that, when recalled as a witness by the prosecution several months after her initial testimony, she said she did not remember October 2002, because of her own personal problems at the time. However, she also testified she was not changing her prior testimony.

We conclude the prosecution engaged in misconduct in the hallway conversations, but it did not cause prejudice, and the trial court did not abuse its discretion in denying a mistrial on this ground.

D. Crime Scene

We have already rejected defendants' argument that the prosecution engaged in misconduct by having the police restrict parking in order to "alter" the crime scene.

E. Contacting Defense Expert

Olague argues the prosecution committed misconduct by contacting a defense expert, Dr. Richard Leo, without identifying themselves as prosecutors in this case. We see no basis for reversal.

In response to a defense motion for sanctions including dismissal, the prosecutor told the court:

Dr. Leo (who had been retained by the defense in Christina Marten's trial) was listed as a defense expert in defendants' trial (apparently regarding false confessions). The defense never provided the prosecution with any discovery regarding Dr. Leo and suddenly gave notice that he was being replaced by a Dr. Davis due to scheduling problems. The prosecutor objected, and Arellano's lawyer told the prosecutor to "go ahead and call Dr. Leo if you don't believe my representation." The prosecutor e-mailed Dr. Leo, identifying himself as the Yolo County District Attorney but not mentioning the case name. The prosecutor

presented a hypothetical fact pattern based on this case. Dr. Leo did not appear to know about the case and agreed it was not a false confession case. The prosecution did not intend to call Dr. Leo as a witness but did feel entitled to cross-examine the defense expert, who testified about Dr. Leo's research in the field, as to whether she was aware the fact pattern of this case had been "run by" Dr. Leo. The prosecutor did not think he did anything wrong in contacting Dr. Leo.

The defense stated they paid Dr. Leo $7,000, had prepared him as a witness, and the prosecutor could not contact him.

The trial court viewed the prosecutor's contact with Dr. Leo as improper and barred the prosecutor from using that contact at trial (though he could use Dr. Leo's published work). The trial court denied the motion for dismissal or other sanctions.

The People challenge the trial court's finding that the contact was inappropriate. We need not address the matter because, even assuming in defendants' favor that the contact was inappropriate, clearly there was no prejudice under any standard. Dr. Leo did not provide any confidential information to the prosecutor, and the prosecutor was not allowed to use the contact at trial.

F. Conclusion Re Claims of Prosecutorial Misconduct

Defendants contend the cumulative effect of prosecutorial misconduct denied their rights to due process and a fair trial.

Having reviewed the claims of prosecutorial misconduct, we reject the contention. Even under defendants' proposed *Chapman* standard, we are satisfied beyond a reasonable doubt that any misconduct did not contribute to the verdicts.

X. Sentencing

A. Section 1170.1

As to each defendant, on the attempted murder Counts (Counts 3 and 4), the trial court imposed a nine year sentence on Count 4 as the principal count and a reduced, one-third term (two years and four months) on Count 3 as a subordinate term (§ 1170.1), but the court did not reduce to one-third the "25 years to life" firearm enhancements (§ 12022.53) on Count 3. Nor did the court reduce to one-third the 10-year section 186.22 criminal street gang enhancement imposed on Cervantes on Count 3.

Defendants contend the determinate minimums of the indeterminate section 12022.53 enhancements are subject to reduction under section 1170.1,[16] because section 1170.11 says, "As used in Section 1170.1, the term 'specific enhancement' means an enhancement that relates to the circumstances of the

---

[16] Section 1170.1, subdivision (a), states in part, "The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses."

crime. It includes, but is not limited to, the enhancements provided in Section[] . . . 12022.53 . . . ." We disagree -- except as to Cervantes's challenge regarding the section 186.22 enhancement.

"[T]he provisions of the Determinate Sentencing Act (DSA), section 1170 et seq., do not apply to the indeterminate 25-year-to-life gun use enhancement imposed under section 12022.53(d) . . . ." (*People v. Mason* (2002) 96 Cal.App.4th 1, 3, 14-15.) "Indeed, it would be impossible to impose one-third of a sentence of 25 years to life, as there is no number from which to calculate the one-third sentence." (*Id.* at p. 15.)

Defendants argue *Mason, supra,* 96 Cal.App.4th 1, fails to address the fact that, in 1998, the Legislature added in section 1170.11 the specific reference to section 12022.53. However, section 12022.53 does provide for some *determinate* enhancements, though they are not at issue in this appeal. (§ 12022.53, subd. (b) [10 years for personal use of firearm in specified felonies], subd. (c) [20 years for personal and intentional discharge of firearm].) That section 1170.11 refers to section 12022.53 without specific limitation to subdivisions (b) and (c) does not lend itself to a conclusion that *Mason* is wrong.

People v. Felix (2000) 22 Cal.4th 651, cited by defendants, does not help their cause. *Felix* said that, under the DSA (§ 1170 et seq.), consecutive enhancements are full term for indeterminate crimes, one-third the term for violent determinate

crimes, and not imposed at all for nonviolent determinate crimes. However, the enhancements at issue in *Felix* were determinate, 10-year enhancements. (*Id.* at p. 654.)

Defendants cite our opinion in *People v. Moody* (2002) 96 Cal.App.4th 987 at page 993, that section 1170.11, as a more specific, later enactment, prevails over earlier, more general provisions. However, what we said in *Moody* was that the express command of the more recent section 1170.11 (that reduced terms for enhancements on subordinate counts includes section 12022.53 enhancements) prevails over the more general language of section 12022.53, subdivision (b), that a 10-year enhancement be imposed "[n]otwithstanding any other provision of law." (*Id.* at p. 993.) This does not help defendants here.

Cervantes argues the trial court erred in failing to reduce, to a one-third subordinate term, the 10-year criminal street gang enhancement (§ 186.22, subd. (b)(4)) imposed on him (but not the other defendants) in connection with the subordinate Count 3 attempted murder. The People do not respond. The point has merit, since section 1170.11 says the enhancements subject to reduction on subordinate counts under section 1170.1 include section 186.22 enhancements, and it is an enhancement with a determinate term. We shall direct correction of Cervantes's abstract of judgment.

B. Section 12022.53

Arellano contends the trial court erred in imposing firearm enhancements (§ 12022.53) for being a principal in a gang-related crime where a principal used a gun. Arellano claims the enhancements did not apply to Counts 2 through 4, because he was convicted, not as a principal, but as an aider/abettor under the natural/probable consequences doctrine. We disagree.

Section 12022.53, subdivision (e)(1), provides, "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d) [use of firearm]."

Section 31 defines "principals" as "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . ."

Arellano argues section 31 means only aiders/abettors of the *target* offense, not aiders/abettors held liable for natural and probable consequences. Arellano argues the natural/probable consequences doctrine was developed by the courts after enactment of section 31, and any ambiguity should be resolved in his favor.

However, *People v. Gonzalez* (2001) 87 Cal.App.4th 1, rejected a due process challenge to section 12022.53, subdivision (e), and concluded, "the only requirement is that the aider and abettor intend to facilitate the target offense and that the offense ultimately committed is the natural and probable consequence of the target offense." (*Id.* at p. 15.)

The contention fails.

C. Upper Term (Arellano and Cervantes)

Arellano and Cervantes contend the trial court's imposition of upper terms based on factors not submitted to the jury violates *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856]. We disagree.

With respect to Arellano, the court said, "Reason for the upper term was set forth in the probation report, but specifically that the defendant induced the others to participate. The seriousness of the offense, the victim's [*sic*] vulnerability in age, the defendant's substantial prior record, the defendant's violent conduct and the defendant's performance on probation and parole. [¶] Court found no mitigating circumstances." The prior criminal record did not need to be submitted to the jury, and this one factor suffices for imposition of the upper term. (*People v. Towne* (2008) 44 Cal.4th 63; *People v. Sandoval* (2007) 41 Cal.4th 825; *People v. Black* (2007) 41 Cal.4th 799 (*Black*).)

As to Cervantes, the court said the upper term was justified, "due to the seriousness of the offense, the victim's vulnerability and age, his prior record and his involvement as the shooter and violent conduct," and the absence of mitigating circumstances. Cervantes argues the only factor which did not need to go to the jury was the prior record, but his prior record is, in his view, minor and not very serious. However, we need not address the substance of his prior record, because there is another valid factor -- that defendant has engaged in violent conduct that indicates a serious danger to society. (Rule 4.421(b)(1).) Contrary to Cervantes's assertion that the jury's verdict did not find he was the shooter, the jury did find he was the shooter. Thus, the jury found true the enhancements for use of a firearm (§ 12022.53, subd. (d)), as alleged in Count Enhancements 1B, 2B, and 3B. Although gang members who do not personally discharge a gun are subject to this enhancement (§ 12022.53, subd. (e)), in this case the pleading alleged, and the jury instructions asked the jury to find, that Cervantes was the shooter. Thus, the indictment alleged as to each count that "OSCAR HURTADO CERVANTES intentionally and personally discharged a firearm and proximately caused great bodily injury and death, within the meaning of [] Sections 12022.53(d), USE OF FIREARM IN FELONIES SPECIFIED IN SECTION 12022.53(a) OF THE PENAL CODE." The jury was instructed, "It is alleged in Count Enhancement 1b, 2b, and

3b, that the defendant Oscar Cervantes intentionally and personally discharged a firearm and caused great bodily injury and/or death to each named victim during the commission of the crimes charged in those related counts. [¶] If you find the defendant Oscar Cervantes guilty of one or more of the crimes thus charged, you must determine whether the defendant Oscar Cervantes intentionally and personally discharged a firearm . . . . [¶] . . . [¶] The term 'intentionally and personally discharged a firearm,' as used in this instruction, means that the defendant himself must have intentionally discharged it."

Personally discharging a firearm at close range and killing someone is indisputably violent conduct that indicates a serious danger to society.

D. Consecutive Terms

Olague and Cervantes contend the trial court erred in imposing consecutive terms on all counts without a statement of reasons and without basing the decision on facts tried to a jury and proven beyond a reasonable doubt.

Although the trial court is required to state reasons for imposing consecutive rather than concurrent sentences (*People v. Sanchez* (1994) 23 Cal.App.4th 1680, 1684), a defendant generally forfeits a statement of reasons if he fails to raise it in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) Although the right to a jury trial on aggravating circumstances is not forfeited without an express waiver by the defendant

(*People v. French* (2008) 43 Cal.4th 36, 46-48), we are bound by the California Supreme Court's holding in *Black, supra*, 41 Cal.4th 799 at page 821, that imposition of consecutive terms does not implicate a defendant's Sixth Amendment rights.

E. Section 190.2

Olague contends the firearm enhancements (§ 12022.53) on the murder counts must be stricken pursuant to section 12022.53, subdivision (j), because (1) he was sentenced to life in prison without possibility of parole based on special circumstances of multiple murder and gang participation (§ 190.2), and (2) at the time in question the former version of section 12022.53, subdivision (j), provided, "the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, *unless another provision of law provides for a greater penalty or a longer term of imprisonment.*" (Stats. 2003, ch. 468, § 22; italics added.) We reject the contention.

As noted by the People, the California Supreme Court rejected an identical contention in *People v. Shabazz* (2006) 38 Cal.4th 55 at pages 66-70 (which was filed in March 2006 -- four months before Olague was sentenced in this case). *Shabazz* concluded "another provision of law" in section 12022.53, subdivision (j), meant another enhancement. (*Id.* at pp. 67, 70.) Indeed, the Legislature later expressly codified *Shabazz* when it subsequently amended section 12022.53, subdivision (j),

to state the court shall impose punishment pursuant to this section unless "another enhancement" (rather than another provision of law) provides for a greater penalty. (Stats. 2006, ch. 901, §§ 11.1, 14.1.) Olague makes no reply on this issue.

F. Summary of Sentencing Issues

We find merit in only one sentencing issue. The trial court erred in failing to reduce, to a one-third subordinate term, the 10-year criminal street gang enhancement (§ 186.22, subd. (b)(4)) imposed on Cervantes (but not the other defendants) in connection with the subordinate Count 3 attempted murder.

XI. Claims of Cumulative Error

Defendants claim the cumulative effect of error warrants reversal. Having reviewed all assignments of error, we reject the contention.

XII. Cases Cited at Oral Argument

At oral argument, Olague's counsel cited three federal cases, none of which helps any of the defendants in this case. *Sechrest v. Ignacio* (9th Cir. 2008) 549 F.3d 789, a habeas corpus case, reversed a death sentence because the prosecutor committed prejudicial misconduct by repeatedly making false, inflammatory statements indicating that the state board of pardon commissioners could release the petitioner from prison if the jury did not return a verdict imposing the death penalty. *United States v. Morena* (3d Cir. 2008) 547 F.3d 191, held the

government's systematic injection of evidence of drug use and drug dealing by the defendant, who was on trial for firearm possession, amounted to prosecutorial misconduct requiring reversal of the judgment. *United States v. Gracia* (5th Cir. 2008) 522 F.3d 597, held it was impermissible *per se* for a prosecutor, during rebuttal closing argument, to offer personal assurances to the jury that government witnesses were telling the truth, or to tell the jury that law enforcement witnesses should be believed simply because they were doing their job. None of these cases supports reversal of the judgments in this appeal.

DISPOSITION

The trial court is directed to amend Cervantes's abstract of judgment (and forward a certified copy to the Department of Corrections and Rehabilitation) reducing to a one-third subordinate term the 10-year enhancement imposed under Penal Code section 186.22 in connection with the subordinate Count 3 attempted murder. The judgments are otherwise affirmed.

SIMS, J.

We concur:

BLEASE, Acting P. J.

RAYE, J.